

Recommendations

Recommendation 1

2.137 The committee recommends further supporting, strengthening and developing education programs including those:

- addressing racism in Australian society;
- addressing the scope of conduct caught by Part IIA of the *Racial Discrimination Act 1975* as judicially interpreted; and
- about the meaning and scope of any amendments to Part IIA of the *Racial Discrimination Act 1975*.

Recommendation 2

2.138 Recognising the profound impacts of serious forms of racism, the committee recommends that leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public.

Recommendation 3

2.139 The committee received evidence about a number of proposals in relation to Part IIA of the *Racial Discrimination Act 1975*. Given the nature and importance of the matters considered by the committee for this inquiry – primarily the right to freedom of speech, the right to be free from serious forms of racially discriminatory speech, and the importance of the rule of law – views varied among members of the committee as to how to balance these appropriately. The range of proposals that had the support of at least one member of the committee included:

- (a) no change to sections 18C or 18D;
- (b) amending Part IIA of the *Racial Discrimination Act 1975* to address rule of law concerns and to ensure that the effect of Part IIA is clear and accessible on its face, by codifying the judicial interpretation of the section along the lines of the test applied by Kiefel J in *Creek v Cairns Post Pty Ltd* that section 18C refers to 'profound and serious effects not to be likened to mere slights';
- (c) removing the words 'offend', 'insult' and 'humiliate' from section 18C and replacing them with 'harass';
- (d) amending section 18D to also include a 'truth' defence similar to that of defamation law alongside the existing 18D exemptions;
- (e) changing the objective test from 'reasonable member of the relevant group' to 'the reasonable member of the Australian community'; and

- (f) criminal provisions on incitement to racially motivated violence be further investigated on the basis that such laws have proved ineffective at the State and Commonwealth level in bringing successful prosecutions against those seeking to incite violence against a person on the basis of their race.

Recommendation 4

3.125 The committee recommends that the Parliamentary Joint Committee on Human Rights become an oversight committee of the Australian Human Rights Commission with bi-annual meetings in public session to discuss the Commission's activities. These sessions will examine the Commission's activities, including complaints handling, over the preceding six month period.

Recommendation 5

3.127 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.

Recommendation 6

3.128 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide that the principles applicable to inquiries conducted pursuant to sections 11(1)(aa), 20(1)(b) and 32(1)(b) of the *Australian Human Rights Commission Act 1986* are that:

- (a) dispute resolution should be provided as early as possible; and
- (b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and
- (c) the dispute resolution process is fair to all parties; and
- (d) dispute resolution should be consistent with the objectives of the *Australian Human Rights Commission Act 1986*.

Recommendation 7

3.129 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to empower the Australian Human Rights Commission to offer reasonable assistance to respondents consistent with assistance offered to complainants.

Recommendation 8

3.131 The committee recommends that the Australian Human Rights Commission adopt time limits for processes related to complaint handling activities. These time limits should apply, but not be limited to, the following stages:

- initial assessment of complaint (including provision within this timeframe to dismiss unsubstantiated claims);
- notification to respondents;
- investigation of complaint; and
- conciliation of complaint.

3.132 It may also be necessary to design some flexibility in relation to the time limits.

Recommendation 9

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

- complaints lodged be required to 'allege an act which, if true, could constitute unlawful discrimination';
- a written complaint be required 'to set out details of the alleged unlawful discrimination' sufficiently to demonstrate an alleged contravention of the relevant act; and
- a refundable complaint lodgement fee be lodged with the Australian Human Rights Commission prior to consideration of a complaint (with consideration given to waiver arrangements similar to those that are in place for courts).

Recommendation 10

3.138 The committee recommends that legal practitioners representing complainants be required to certify that the complaint has reasonable prospects of success.

Recommendation 11

3.139 The committee recommends that, where the conduct of the complainant or practitioner has been unreasonable in the circumstances, the Australian Human Rights Commission be empowered to make orders, on a discretionary basis, about reasonable costs against practitioners and complainants in order to prevent frivolous claims.

Recommendation 12

3.141 The committee recommends that the grounds for termination in section 46PH(1) of the *Australian Human Rights Commission Act 1986* be expanded to include a power to terminate where, having regard to all the circumstances of the case, the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted.

Recommendation 13

3.142 The committee recommends that the President's discretionary power under section 46PH of the *Australian Human Rights Commission Act 1986* to terminate complaints be amended so that the President has an obligation to terminate a complaint if the President is satisfied that it meets the criteria under section 46PH.

Recommendation 14

3.143 The committee recommends that section 46PH(1)(a) of the *Australian Human Rights Commission Act 1986* be amended to clarify that the President must consider the application of the exemptions in section 18D to the conduct complained of when determining whether a complaint amounts to unlawful discrimination.

Recommendation 15

3.144 The committee recommends that section 46PH of the *Australian Human Rights Commission Act 1986* be amended to include a complaint termination criterion of 'no reasonable prospects of success'.

Recommendation 16

3.146 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide for a process whereby a respondent to a complaint can apply to the President for that complaint to be terminated under section 46PH of the *Australian Human Rights Commission Act 1986*.

Recommendation 17

3.148 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide for the appointment of a judge as a part-time judicial member of the Australian Human Rights Commission. The judicial member could perform the President's functions in dealing with initial complaints under Part IIA of the *Racial Discrimination Act 1975*.

Recommendation 18

3.153 The committee recommends that section 46PO of the *Australian Human Rights Commission Act 1986* be amended to require that if the President 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.

3.154 This amendment should include that:

- the onus for seeking leave rests with the applicant; and
- the Australian Human Rights Commission provide to the Federal Court or Federal Circuit Court a certificate detailing its procedures and reasons for termination of the complaint as part of the process of seeking leave.

Recommendation 19

3.155 The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to make explicit that, subject to the court's discretion, an applicant pay a respondent's costs of future proceedings if they are unsuccessful or if the respondent has, at any earlier point, offered a remedy which is at least equivalent to the remedy which is ultimately ordered.

Recommendation 20

3.156 The committee recommends that consideration be given to whether a complainant's solicitor should be required to pay a respondent's costs where they represented a complainant in an unlawful discrimination matter before the Federal Circuit Court or Federal Court and the complaint had no reasonable prospects of success.

Recommendation 21

3.157 The committee recommends that a plaintiff/complainant, following the termination of a complaint by the Australian Human Rights Commission, who makes an application to the Federal Court or Federal Circuit Court under section 46PO of the *Australian Human Rights Commission Act 1986*, in relation to a complaint that in whole or in part involves Part IIA of the *Racial Discrimination Act 1975*, be required to provide security for costs subject to the court's discretion.

Recommendation 22

4.42 The committee recommends that the Australian Human Rights Commission should issue guidelines outlining the distinct roles of the President and the relevant Commissioners in relation to complaint handling and public comment and act to ensure that perceptions of complaint soliciting are not able to be drawn from the behaviour of the Commission, its Commissioners or its officers.

