

Chapter 4

Soliciting complaints to the Australian Human Rights Commission

Introduction

4.1 This chapter focuses on the third term of reference of the inquiry:

Whether the practice of soliciting complaints to the [Australian Human Rights Commission (AHRC)] (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the [AHRC], and whether any such practice should be prohibited or limited.¹

4.2 Some evidence to the committee explored concerns about the AHRC's 'soliciting' of complaints and whether this is consistent with the AHRC's legislative function to provide advice about, and promote awareness of, human rights.

4.3 Some submitters and witnesses expressed concern that the AHRC overstepped its legislated educational function and solicited complaints that otherwise might not have been made. The most prominent instance of this is the complaints made against Mr Bill Leak in relation to a cartoon drawn by him. This case study is useful for illustrating the arguments for and against the AHRC's actions in respect of 'soliciting complaints'.

4.4 Notwithstanding these concerns, submitters and witnesses were supportive of this function of the AHRC and have generally expressed confidence in the AHRC's discharge of its education responsibilities.

4.5 This chapter begins by examining the AHRC's legislative obligation to raise awareness about human rights in Australia. The remainder of the chapter discusses whether the AHRC engaged in behaviour that would be considered complaint soliciting; and whether there is a need for any changes to prevent this type of behaviour from occurring in the future.

Community education and awareness of human rights

4.6 This first section explains the legislated responsibilities that the AHRC must undertake.

4.7 The functions of the AHRC are described in section 11 of the *Australian Human Rights Commission Act 1986* (AHRC Act). One of these functions is to

1 Parliamentary Joint Committee on Human Rights, *Inquiry report: Freedom of speech in Australia*, Terms of Reference, Chapter 1 at paragraph [1.1].

promote awareness of human rights in Australia. Section 11(1)(g) describes this function:

...to promote an understanding and acceptance, and the public discussion, of human rights in Australia...²

4.8 Section 11(1)(h) also describes this function:

...to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth...³

4.9 In its submission to the inquiry, the AHRC explained these functions in more detail:

Commissioners are entitled to advise people of their right to lodge complaints under anti-discrimination law. Indeed, making people aware of their rights under anti-discrimination law is an important part of the role of Commissioners.⁴

4.10 These functions broadly align the following competencies and responsibilities of national human rights institutions outlined in the Paris Principles:

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize [sic] human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.⁵

4.11 Many submitters were unconditionally supportive of the AHRC's roles to educate and raise awareness, which are seen as essential to the AHRC achieving its

2 *Australian Human Rights Commission Act 1986* (AHRC Act), section 11(1)(g). The functions of each of the individual Commissioners are also described within this Act. All Commissioners have a legislative duty to 'promote understanding' of human rights law.

3 AHRC Act, section 11(1)(h). All Commissioners have a legislative duty to 'undertake educational programs'.

4 Australian Human Rights Commission (AHRC), *Submission 13*, 70.

5 Office of the United Nations High Commissioner for Human Rights, *Principles relating to the Status of National Institutions (The Paris Principles)*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

legislated goals.⁶ The Law Institute of Victoria (LIV) highlighted that 'one of the explicit functions of the AHRC is to "promote an understanding and acceptance, and the public discussion, of human rights in Australia".⁷ The importance of increasing awareness in the community was also highlighted by Professors Katherine Gelber and Luke McNamara who noted that:

Many of the communities who are targeted by racial vilification did not know about the existence of Part IIA [of the *Racial Discrimination Act 1975* (RDA)] and other anti-vilification laws.⁸

4.12 The Cyber Racism and Community Resilience Research Project relayed the results of a survey on this issue which found that the AHRC should be more proactive in its educative role. Many respondents to the survey:

...believed the laissez faire environment online which requires individuals to initiate and pursue complaints, facilitates racial harassment and the spread of race hatred.⁹

The Bill Leak case

Background

4.13 The most well-known example of the AHRC purportedly 'soliciting complaints' relates to the actions of the Race Discrimination Commissioner, Dr Tim Soutphommasane, in relation to a cartoon drawn by the editorial cartoonist for *The Australian* newspaper, Mr Bill Leak. In August 2016, Mr Leak drew a cartoon which attracted media attention and was subject to a number of complaints under section 18C of the RDA. This case was explored in Chapter 2 with respect to the application of the section 18D 'exemptions' of the RDA relating to artistic expression and public comment.

4.14 In his submission, Mr Leak explained the nature and context of the cartoon:

The cartoon in question was drawn in the context of a raging debate about aboriginal issues that had been triggered by a Four Corners Program about conditions inside a juvenile detention centre in the Northern Territory. My intention was to try to draw attention to the fact that the high level of parental neglect and abuse of children in many Aboriginal communities is one of the underlying reasons why the disproportionately high number of

6 See, for example: Dr Carolyn Tan, *Submission 3*, 2; Australian Lawyers for Human Rights, *Submission 5*, 4; Hunter Asylum Seeker Advocacy, *Submission 18*, 2; Settlement Services International, *Submission 21*, 7; ANTaR, *Submission 48*, 3; Dr Helen Pringle, *Submission 42*, 13–14; Association of Labor Lawyers Qld, *Submission 55*, 6; Aboriginal Legal Service of WA, *Submission 59*, 21–22; Anglican Social Responsibilities Commission, *Submission 61*, 5–6.

7 Law Institute of Victoria (LIV), *Submission 184*, 8.

8 Professor Katherine Gelber and Professor Luke McNamara, *Submission 2*, 6.

9 Cyber Racism and Community Resilience Research Project, *Submission 54*, 7.

97% of the inmates in the detention centre were indigenous. It depicted an Aboriginal police officer, presenting a wayward child to his father, saying, "You'll have to sit down and talk to your son about personal responsibility," to which the father replies, "Yeah righto, what's his name then?"¹⁰

4.15 A number of complaints were lodged with the AHRC in relation to the cartoon. Mr Bill Leak gave evidence to the committee that he understood that lawyers from the Aboriginal Legal Service of WA (ALS WA) had actively sought or 'solicited' complaints about his cartoon:

They took it upon themselves to go to a home where two men lived and show them my cartoon. This is at least three months after it had been published. These blokes had no idea what the cartoon was about. They had never seen it before. They went in there and presented it to two Aboriginal men and said, 'Do you think that's racist?' 'Yeah, I do,' they said. They said, 'Righto, sign here.' They provided them with already made complaints and asked them to sign them. These two poor men were being, in my view, really shabbily treated by these people who claimed to be standing against racism as expressed in my cartoon.¹¹

4.16 Professor Dennis Eggington, Chief Executive Officer, ALS WA was questioned by the committee about how the complaints arose and whether the two complainants had seen the cartoon prior to meeting with lawyers from the ALS WA:

Senator PATERSON: I am interested in following up in a little bit more detail Mr Leaser's questions about how the Leak complaint arose. Obviously there has been some public reporting on this, and I accept that that public reporting may not be accurate, and I want to provide you with an opportunity to point out if and where it might be inaccurate. One of the things that has been raised in the public reporting about the complaint is that the two men had not seen the cartoon until they met with lawyers from your organisation. In your knowledge, is that true?

Prof. Eggington: I do not really know. If people had been shown the cartoon, I do not see anything wrong with that either.

Senator PATERSON: So, if the lawyers were there to see them about an unrelated matter, but while they were there said, 'By the way, have you seen this cartoon? How do you feel about it? Would you like us to make a complaint on your behalf?' in your view, that is a legitimate process?

Prof. Eggington: Absolutely. We do it all the time. Someone comes in with a criminal matter and talking through it you see that there is also a civil matter that needs to be dealt with. It is part and parcel of that outreach program. I am only going on what my understanding was and that we were

10 Mr Bill Leak, *Submission 169*, 2.

11 Mr Bill Leak, *Committee Hansard*, 1 February 2017, 88.

instructed by those guys. Whether they were shown the cartoon or not, I cannot tell you. Had our lawyers actually said, 'Look at this. What do you think of this?' I would say that they were doing their job.

Senator PATERSON: If it did take place in that way, can you see how some people might see that as actively soliciting or seeking a complaint, and why they might not think that is a good use of resources?

Prof. Eggington: We are not ambulance chasers and we do not make any money from any of this sort of work.

Senator PATERSON: I understand.

Prof. Eggington: I will go on the record saying that I personally do not see anything wrong with that. Soliciting work—it happens everywhere; people solicit for work. If you have really astute lawyers whose job is to educate people around discrimination stuff, and here is a cartoon that may or may not offend, and someone says, 'Have a look at it,' I do not see anything wrong with that.¹²

4.17 Dr Soutphommasane made two public comments about the case. The first comment, published in Fairfax Media quoted Dr Soutphommasane:

Our society shouldn't endorse racial stereotyping of Aboriginal Australians or any other racial or ethnic group.

A significant number of people would agree that this cartoon rehearses racial stereotypes about Aboriginal Australians.

If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can lodge a complaint under the Racial Discrimination Act. Section 18D of the Act does protect, however, artistic expression and public comment, provided they were done reasonably and in good faith.¹³

4.18 The second comment was posted in a Facebook message post which reiterated the substance of the first comment.

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.¹⁴

12 *Committee Hansard*, 3 February 2017, 40-42.

13 *AHRC, Submission 13*, 70-71.

14 *AHRC, Submission 13*, 71.

4.19 A further comment was made by Dr Soutphommasane on his Twitter account which expressed an abbreviated version of his earlier comments, accompanied by a link to a media article about the cartoon:

Our society shouldn't endorse racial stereotypes of Aboriginal Australians - or, for that matter, of any other group...¹⁵

4.20 A key procedural point of significance is that the complaints handling process is overseen by the President (or delegate) and that the 'Race Discrimination Commissioner plays no role in handling complaints'.¹⁶

The AHRC's role in the Bill Leak case – the case in favour

4.21 The AHRC acknowledged that it raises awareness about people's rights under human rights laws through the mass media and social media, however it stated that it has 'not called for complaints to be lodged under section 18C of the RDA'.¹⁷ The AHRC further noted:

...at no stage did the Commissioner 'call for' or 'solicit' complaints about the cartoon or say that complaints about the cartoon should be made. At no stage did the Commissioner offer a view on whether any complaint about the cartoon would be successful. Indeed, he drew specific attention to exemptions to protect artistic expression and public comment that would be available in relation to any such claim.¹⁸

4.22 Many submitters were supportive of this position. Reconciliation South Australia highlighted that:

...it is Dr. Soutphommasane's job to educate and inform people of their rights. Where offence is taken, people have the right to complain. Letting people know that such avenues exist falls within the remit of the role of the [AHRC]. Dr. Soutphommasane's role should not be undermined for carrying out his duties where the politically charged language of "soliciting" responses is pointed at him.¹⁹

4.23 The LIV submitted that:

In this case, the Commissioner's conduct is fulfilling the purpose of the [AHRC] by engaging with a popular issue for the legitimate aim of promoting the public discussion of human rights in Australia, and

15 Tim Soutphommasane (@timsout), 'Our society shouldn't endorse racial stereotypes of Aboriginal Australians – or, for that matter, of any other groups', tweet, 3 August 2016, <https://twitter.com/timsout/status/761073783016783874> (accessed 30 January 2016).

16 AHRC, *Submission 13*, 21–22.

17 AHRC, *Submission 13*, 70.

18 AHRC, *Submission 13*, 71.

19 Reconciliation South Australia, *Submission 106*, 2.

informing and educating people on the avenues for redress available to them if they believe they are victims of racial vilification.²⁰

4.24 In light of the terms of reference, some submitters, including the LIV and the National Congress of Australia's First Peoples noted that the AHRC and its Commissioners are obligated to fulfil their functions as described under statute. They disputed how the exercise of these functions impinges on freedom of speech:

It is unclear how the [AHRC], in fulfilling its legislated duties by encouraging victims of discrimination to seek the remedies to which they are entitled at law, would have an adverse impact upon freedom of speech.²¹

4.25 In its submission, the AHRC highlighted that 'although the Race Discrimination Commissioner is not involved in the complaint handling process, he or she also plays an active role in advancing public understanding and debate about racism, race relations and the RDA'. The AHRC emphasised the importance of this role by noting the 'under-reporting of experiences of racial discrimination'.²²

4.26 Many submitters stated that they are not aware of any instances where the AHRC, its officers or third parties have solicited complaints.²³ A group of submitters representing multicultural communities noted that the process of deciding when education and awareness building becomes solicitation is largely subjective:

We believe the definition or interpretation of the word "soliciting" is highly subjective and depends on whether one agrees that the public should be well informed or whether the information should be kept from the public based on an ideological view that people have no rights when it comes to discrimination or abuse on the grounds of race, colour or ethnic origins.²⁴

4.27 Ryan Carlisle Thomas Lawyers submitted that characterising the AHRC's community education function as soliciting complaints not only trivialises the work of the AHRC, but also trivialises the complaints that are being made.²⁵ Furthermore, the

20 LIV, *Submission 184*, 7.

21 LIV, *Submission 184*, 8. See also: National Congress of Australia's First Peoples, *Submission 188*, 14–15.

22 AHRC, *Submission 13*, 24.

23 See, for example: Executive Council of Australian Jewry, *Submission 11*, 26; Townsville Community Legal Service, *Submission 23*, 6; Arts Law, *Submission 27*, 5; Legal Aid Queensland, *Submission 69*, 7; Arab Council Australia, *Submission 113*, 4.

24 Multicultural Communities Council of NSW, National Sikh Council of Australia, Chinese Community Council of Australia, Vietnamese Community in Australia (NSW), and Macedonia Orthodox Church (Rockdale), *Submission 15*, 3.

25 Ryan Carlisle Thomas Lawyers, *Submission 66*, 7.

Australian Lawyers Alliance noted that 'concerns regarding "soliciting complaints" appear to be underpinned by a misunderstanding of the role of the AHRC'.²⁶

4.28 Dr Helen Pringle, a Senior Lecturer at the School of Social Sciences at the University of New South Wales, has stated that the Bill Leak case is the 'sole evidence' of complaint soliciting by the AHRC.²⁷ The LIV agreed noting that 'there is no indication that there is a practice of complaints being solicited to the AHRC'.²⁸

4.29 A different perspective was offered by JobWatch, which argued that even if the AHRC does solicit complaints, it:

...should not be prohibited or limited in anyway as individuals aggrieved by unlawful discrimination should not just be entitled to a legal remedy but should also be entitled to know they are entitled to a legal remedy.²⁹

4.30 A separate point was made by Nationwide News relating to the AHRC's conciliation function:

It could be argued that solicitation by Officers of the AHRC, including Commissioners, does not amount to impartiality by a decision maker because the President of the AHRC ultimately decides whether or not a complaint should be terminated. This argument is misguided because the President should not be expected to eliminate unbiased comments made by Commissioners to members of the public in the process of determining whether a complaint should be terminated.³⁰

The AHRC's role in the Bill Leak case – complaint soliciting?

4.31 Some submitters to this inquiry strongly disagreed and expressed concerns in relation to this case, arguing that Dr Soutphommasane did, in fact, solicit complaints against Mr Leak.³¹ Family Voice contended that Dr Soutphommasane encouraged people to lodge complaints creating the perception that the 'commissioner has prejudged those complaints'.³² Aged Pensioner Power agreed:

The controversy that surrounded the Bill Leak cartoon fiasco erased all confidence and trust that a great deal of Australians held in the "[AHRC]". The idea that Mr. Soutphommasane "touted" for complaints was

26 Australian Lawyers Alliance, *Submission 35*, 13.

27 Dr Helen Pringle, *Submission 42*, 12.

28 LIV, *Submission 184*, 7.

29 JobWatch, *Submission 29*, 12. See also, for example: Darebin City Council, *Submission 98*, 4.

30 Nationwide News, *Submission 117*, 6.

31 See, for example: Institute of Public Affairs, *Submission 58*, 70; Australian Liberty Alliance, *Submission 14*, 2.

32 FamilyVoice Australia, *Submission 49*, 10.

abhorrent to say the least and should at the very minimum be prohibited.³³

4.32 This matter was also of significant concern to Mr Anthony Morris QC, who submitted to the committee that:

...despite Dr Soutphommasane's claim (as quoted in *The Sydney Morning Herald*) that "'a significant number' of people would agree the cartoon was a racial stereotype of Aboriginal Australians"; despite the fact that Dr Soutphommasane had practically guaranteed that such a complaint would be gratefully received at the AHRC; and despite the fact that it costs nothing to lodge such a complaint with the AHRC – despite all of these circumstances, the AHRC was able to find just one solitary individual out of Australia's population of roughly 24¼ million, willing to put her name to such a complaint.³⁴

4.33 Mr Morris went on to note that '[u]ltimately, with assistance from their friends in the Aboriginal Legal Service of Western Australia, the AHRC was able to produce two more complaints.'³⁵

4.34 Dr Sev Ozdowski added to this by making a broad observation in which he noted that 'while Human Rights Commissioner I regularly witnessed discussions about soliciting a particular type of complaint in order to advance regulatory change'.³⁶ Nationwide News agreed and added:

...there have been instances in which Officers of the [AHRC] have identified particular acts as potential breaches of Section 18C and have invited members of the public to submit complaints to the AHRC.³⁷

4.35 While not providing an example of complaint solicitation, the Australian Taxpayers Alliance commented on the broader principle, noting 'that the solicitation of complaints creates an unacceptable conflict of interest' for the officials tasked with advising on the merits of a complaint, and more importantly remaining a neutral conciliator.³⁸ The Federation of Indian Associations of NSW said that the AHRC should not solicit complaints and noted that:

Soliciting complaints is political and AHRC officials should not take part in it. If people feel the need to lodge an 18C complaint, the urge to lodge this complaint should come from them.³⁹

33 Aged Pensioner Power, *Submission 60*, 2.

34 Anthony Morris QC, *Submission 307*, 131.

35 Anthony Morris QC, *Submission 307*, 131-132.

36 Dr Sev Ozdowski, *Submission 101*, 3.

37 Nationwide News, *Submission 117*, 6.

38 Australian Taxpayers Alliance, *Submission 110*, 6.

39 Federation of Indian Associations of NSW, *Submission 112*, 8.

Prohibiting solicitation

Proposals to prohibit solicitation

4.36 Arising from the discussion above, it can be seen that some submitters argued that the AHRC should be prohibited or prevented from soliciting complaints.⁴⁰ However, in terms of assessing this suggestion, it is not clear how to prohibit or limit the solicitation of complaints to the AHRC without unduly impinging on its functions relating to education and raising awareness. In fact, the committee did not receive any detailed proposals as to how prohibition of the solicitation of complaints could occur. As noted earlier, it is difficult to draw a line between what constitutes actions intended to educate as opposed to ones of solicitation. As Dr Helen Pringle explained in her submission:

It is difficult to know what would be the mechanism of and penalty for prohibiting or limiting any soliciting of complaints to the [AHRC]. It is also difficult to ascertain what 'the practice of soliciting complaints to the [AHRC]' actually means. For example, does 'soliciting complaints' include advising a person who expresses unease with certain behaviour that there are legal provisions and a Commission to address such behaviour?⁴¹

4.37 The Public Law and Policy Research Unit at the University of Adelaide agreed that there should not be any restrictions on the AHRC's educative functions. Their submission also added that there should be no barriers to third parties such as legal representatives and community groups 'offering assistance to potential complainants in the formulation and/or lodgement of complaints'.⁴²

Would prohibition restrict free speech?

4.38 In addition to the absence of any concrete proposals to enforce prohibition, questions have been raised as to an unintended consequence of prohibiting the solicitation of complaints. In its submission to the committee, Australian Lawyers for Human Rights highlighted that any prohibition or restriction on the AHRC and its officers with regard to its awareness raising function would, in itself, be a restriction on freedom of speech:

...to suggest that there should be any kind of prohibition or limitation upon any person—in any capacity—who publicly encourages Australians to pursue avenues of redress which are legally open to them. That would

40 See, for example: Aged Pensioner Power, *Submission 60*, 2; FamilyVoice Australia, *Submission 49*, 11; Australian Taxpayers Alliance, *Submission 110*, 6;

41 Dr Helen Pringle, *Submission 42*, 12.

42 Public Law and Policy Research Unit, University of Adelaide, *Submission 88*, 12.

indeed be a restriction on free speech. It would also dangerously undermine the rule of law.⁴³

Committee views and recommendations

4.39 The committee recognises and respects the educative role that the AHRC and its Commissioners are legally obliged to fulfil. The committee is supportive of the AHRC continuing this important work.

4.40 Notwithstanding this, the committee agrees that the comments made by the Race Discrimination Commissioner in relation to the Bill Leak case could have been perceived by some as solicitation. This view notwithstanding, the committee has not received evidence more broadly that complaint solicitation is a practice engaged in by the AHRC.

4.41 However, in light of community perceptions and potential damage to public confidence in the AHRC, it is the committee's view that the AHRC should clarify its role, and the distinct roles of the President and the relevant Commissioners, in relation to complaint handling and public comment and should ensure that perceptions of complaint soliciting are not able to be drawn from the behaviour of the AHRC, its Commissioners or its officers in the future.

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.

43 Australian Lawyers for Human Rights, *Submission 5*, 5. See also, for example: Federation of Indian Associations of NSW, *Submission 112*, 8.

