

Chapter 4

Offensive and misleading material

Introduction

4.1 One of the primary concerns raised by witnesses and submitters in this inquiry has been the harm to the psychological and emotional wellbeing of members of the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community through the distribution of offensive and denigrating materials during the Australian Marriage Law Postal Survey (postal survey).

4.2 In its September 2015 report on an inquiry into the Government's then proposed plebiscite on marriage equality, the Legal and Constitutional Affairs References Committee found that 'the matter of marriage is not one which should be decided by popular vote'.¹ A number of submissions to the 2015 inquiry 'expressed concern about the impact of a public vote on the [LGBTIQ] community' with one submitter stating 'that a public vote is likely to present significant risks to the psychological health and wellbeing of those most affected'.²

Offensive material

4.3 Regrettably, many of the fears of offensive and misleading behaviour raised in the 2015 report became a feature of the recent postal survey. The committee has received a considerable number of submissions that have provided examples of offensive material being distributed on social media, on posters and in the mail. The committee has chosen to publish a small representative selection of this material on its website.³

4.4 In its interim submission to the committee in August 2017, the NSW Gay and Lesbian Rights Lobby (NSWGLRL) provided a catalogue of material which had already been disseminated prior to the survey being mailed out. NSWGLRL noted that this material:

has a significant impact on the mental health of so many LGBTIQ Australians. Young LGBTIQ people are at a six times greater risk of suicide, and this material which perpetuates hateful and offensive comments is not likely to improve this situation.

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- 1 Senate Legal and Constitutional Affairs References Committee, *Matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia*, September 2015, p. 31.
 - 2 Senate Legal and Constitutional Affairs References Committee, *Matter of a popular vote, in the form of a plebiscite or referendum, on the matter of marriage in Australia*, September 2015, pp 15–16.
 - 3 See, for example: Sharni Benson, *Submission 21*; Ms Fiona McCandless, *Submission 11*; Mx George Foulkes-Taylor, *Submission 14*; Judi Nicholls, *Submission 15*; Public Interest Advocacy Centre and Community Legal Centres NSW, *Submission 34*; Mr Alex Greenwich MP, *Submission 33*; SHINE SA, *Submission 36*.

The rates of suicide among young trans and intersex people are even higher, with young trans people being 35% more likely to attempt suicide. In addition, young trans people are more likely than not to have self-harmed with nearly 80 percent having done so compared to just 11 percent of non-trans adolescents.⁴

4.5 NSWGLRL observed that, at that time, it had received a significantly increased number of offensive material since the announcement of the postal survey.⁵

4.6 Ms Sophie Cleary provided the committee with a copy of the offensive pamphlet that her family received in their mailbox and, in an accompanying letter, described the pamphlet as 'a disappointing and heartbreaking circulation of harmful material'.⁶ Ms Cleary elaborated:

I felt that leaflet was based in extremely loose facts (which are unfounded to my knowledge). I think it has the potential to be extremely offensive and harmful to the LGBTIQI community. I worry for the safety and sense of wellbeing of that community and their children and families at large. I think we have a duty of care to call out unnecessary and hateful behaviour directed at any marginalised community. I had assumed that the government would also maintain a responsibility to protect the vulnerable amongst us also.⁷

4.7 Ms Trinh De Leon described the effect that the offensive material is having on her family:

This whole notion of the postal survey hurts me and my family to the core of our being. To make matters worse and pour salt on our wounds, we see all of these negative/insulting "no" campaigns flashed around and distributed, not only to us, but to our friends/family and the community at large who are being misled and just perpetuates the injustice and discrimination we are facing.⁸

4.8 One submitter described the intimidating behaviour engaged in by some members of the community:

Our Dutton Park (inner city Brisbane) street corner has grown quite a collection of rainbow flags in support of the marriage equality plebiscite. This has generally received positive comments from passers-by and

4 Victorian Gay and Lesbian Rights Lobby and the NSW Gay and Lesbian Rights Lobby, *Submission 3*, p. 6.

5 Victorian Gay and Lesbian Rights Lobby and the NSW Gay and Lesbian Rights Lobby, *Submission 3*, p. 5.

6 Ms Sophie Cleary, *Submission 8*, p. [1].

7 Ms Sophie Cleary, *Submission 8*, p. [1].

8 Ms Trinh De Leon, *Submission 19*, p. [1].

neighbours. Last night someone spray painted black swastikas on our flags, our fences, a garage door and my business sign.⁹

4.9 A 42-year old transgender man from rural Queensland submitted his experiences of the postal survey to the committee:

After the Survey was announced, my world becomes hell. It was the hate and vitriol of the 1990s that I experienced, but this time our Prime Minister gave this hatred a name—respectful debate.¹⁰

4.10 Another submitter described the broader effect of the postal survey on LGBTIQ people:

The Postal survey to a gay and lesbian person was never just about SSM [same-sex marriage], it seemed like it was a survey on whether gay and lesbian people were good enough for the Australian people. Having the whole Country vote on this was a horrible feeling and having them judge you, brought up all sorts of emotions from my youth.¹¹

4.11 A study of nearly 10 000 LGBTIQ Australians, families and friends by the Australia Institute and the National LGBTI Health Alliance, found that more than 90 per cent of respondents 'reported the postal vote had a negative impact on them to some degree'.¹² Furthermore:

The most shocking finding of the study was that LGBTIQ respondents said that experiences of verbal and physical assaults more than doubled in the three months following the announcement of the postal survey compared with the prior six months.

They reported an increase of more than a third in depression, anxiety and stress during the same period.

Almost 80% of LGBTIQ people and almost 60% of allies said they found the marriage equality debate considerably or extremely stressful.¹³

9 Hon Tanya Plibersek MP, Member for Sydney, *Submission 26*, p. [4]. This submission quotes a correspondent to Ms Plibersek's office.

10 Name withheld, *Submission 23*, p. [1].

11 Hon Tanya Plibersek MP, *Submission 26*, p. [4]. This submission quotes a correspondent to Ms Plibersek's office.

12 Paul Karp, 'Marriage equality survey marred by doubling in assaults', *The Guardian*, 5 December 2017, <https://www.theguardian.com/australia-news/2017/dec/05/marriage-equality-survey-marred-by-doubling-in-reported-assaults> (accessed 5 December 2017). See also: S Ecker, E Bennett, 'Preliminary results of the Coping with marriage equality debate survey: Investigating the stress impacts associated with the Australian marriage equality debate during the lead up to the postal survey results announcement', The Australia Institute and National LGBTI Health Alliance, December 2017, http://www.tai.org.au/sites/default/files/P447%20Briefing%20note_LGBTIQ%2B%20coping%20survey%20preliminary%20results.pdf (accessed 12 December 2017).

13 Paul Karp, 'Marriage equality survey marred by doubling in assaults', *The Guardian*, 5 December 2017, <https://www.theguardian.com/australia-news/2017/dec/05/marriage-equality-survey-marred-by-doubling-in-reported-assaults> (accessed 5 December 2017).

4.12 In its submission to the committee, SHINE SA explained the results of a survey it undertook after the postal survey had concluded and the result had been announced. The SHINE SA survey found that 74 per cent of respondents to that survey had experienced negative impacts as a result of the postal survey. Of those experiencing a negative impact, 23 per cent indicated that the severity was severe.¹⁴

4.13 just.equal found similar results in its own survey of the LGBTIQ community:

Two-thirds of participants (66.3%) reported that their experience of the postal survey period was worse than they expected.

Over three-quarters (78.6%) reported that they were adversely impacted by the postal survey in a way that would not have otherwise occurred.

Over half (55.7%) felt that the process would not be worthwhile, even if the 'Yes' vote prevailed.¹⁵

4.14 Importantly, the committee has heard that the trauma experienced by members of the LGBTIQ community has continued, even after the conclusion of the postal survey and the passage of marriage equality legislation. Divisions exposed during the postal survey process have left some in the LGBTIQ community mistrustful and isolated within their own neighbourhoods and communities.¹⁶ In its submission, Rainbow Families NSW shared the experience of Kate and her family:

We received two personalised letters from our neighbours expressing their traditional views on marriage and their negative thoughts about our family and the wider LGBTIQ community. We received the first letter on a Friday, the next the following day. The letters spoke about "militant lesbians storming our churches and mosques demanding to get married", that we have equal rights as evidenced by "being able to adopt and raise a child" (our son is not adopted). That the local community "tolerates you" and that "the silent majority will succeed".

We cried for that whole weekend and were scared to check our letter box on the Sunday—we believed we were going to receive more hurtful letters from different neighbours. We started to think about moving out of the area? But unfortunately we can't afford to move. We stopped going to the local parks, we avoided going to the local supermarket. We became hermits and didn't want to be seen in the local community. My heart rate went up everytime I opened the front door and went out the front for fear of seeing the neighbours. We tried to shield our 2 year old son from our pain - but he could see it. One night he said "I'm scared of the neighbours". This was so upsetting to hear. Neighbours who we had been friendly with started being less friendly - or were we just being paranoid? My partner and I both took sick days off from work and we also left our home and area for safer more accepting areas to try and get away from it all. The result of the survey gave us no joy. We were relieved with the result but our relief quickly turned to

14 SHINE SA, *Submission 36*, pp 1–2.

15 just.equal, *Submission 32.4*, p. 1.

16 See, for example: SHINE SA, *Submission 36*; Rainbow Families NSW, *Submission 39*.

anger, fear and pain again when we soon found out we live in the highest "no" voting electorate. We went through all of the emotions again – making plans to move - as how can we bring up our son in this area?¹⁷

4.15 In a supplementary submission, the Victorian Gay and Lesbian Rights Lobby and the NSWGLRL noted the impact of this ongoing trauma on mental health services:

Mental health services have reported a 40% increase in people seeking support during and after the survey, forcing them to divert resources from other critical mental health services.¹⁸

Marriage Law Survey (Additional Safeguards) Act 2017

4.16 The government recognised that many of the protections that exist through current electoral laws would not apply to the postal survey 'given this process is conducted through the' Australian Bureau of Statistics (ABS).¹⁹ The government, supported by the opposition, passed the *Marriage Law Survey (Additional Safeguards) Act 2017* (Safeguards Act) in order to bolster existing electoral law and other protections to provide:

...provisions to ensure relevant authorisations on advertisements, reasonable opportunity to have opposing views broadcast, offences against bribery and threats and the prohibition of misleading and deceptive conduct in relation to the completion of survey forms...

This Bill will also propose a further safeguard against vilification, intimidation and threats to cause harm because of the views expressed or believed to be held in relation to the Survey, or because of the religious conviction, sexual orientation or gender identity or intersex status of a particular person or group.²⁰

4.17 These protections commenced on 14 September 2017 (36 days after the postal survey was announced) and concluded on 15 November 2017.²¹

17 Rainbow Families NSW, *Submission 39*, p. 4.

18 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Supplementary Submission 3.1*, p. 11.

19 Senator the Hon Mathias Cormann, Minister for Finance, 'Additional Safeguards to facilitate Australian Marriage Law Postal Survey', Media Release, 12 September 2017, <http://www.financeminister.gov.au/media-release/2017/09/12/additional-safeguards-facilitate-australian-marriage-law-postal-survey> (accessed 5 December 2017).

20 Senator the Hon Mathias Cormann, Minister for Finance, 'Additional Safeguards to facilitate Australian Marriage Law Postal Survey', Media Release, 12 September 2017, <http://www.financeminister.gov.au/media-release/2017/09/12/additional-safeguards-facilitate-australian-marriage-law-postal-survey> (accessed 5 December 2017). See also: Explanatory Memorandum, p. 3.

21 Australian Bureau of Statistics, 'Safeguards', <https://marriagesurvey.abs.gov.au/safeguards> (accessed 5 December 2017).

Concerns about the Safeguards Act

4.18 NSWGLRL put forward its view that the government's delay in introducing additional safeguards around the postal survey until after the High Court's ruling on the validity of the Finance Minister's advance has resulted in the publication of misleading and intimidating material, for which there may be no recourse:

[NSW]GLRL is concerned about any continued delay before such regulations are considered by the government and relevant stakeholder groups. We continue to be made aware of a number of pieces of advertising which would be considered misleading and intimidating, for which there may currently be not appropriate or effective legal avenue to have these matters dealt with.²²

4.19 LGBTI Legal Service raised its concerns about the lack of definition around what constitutes a "notifying entity" under the Safeguards Act. As a legal services provider, it was unclear whether LGBTI Legal Service 'would be a valid notifying entity for the purpose of a civil penalty application'.²³ Furthermore:

The [LGBTI Legal] Service's prospective applications were delayed by the need to seek legal advice on the meaning of notifying entity. Further, the Service understand from conversations with other community stakeholders that groups and individuals who could not obtain legal advice were delayed or deterred in pursuing matters under the Safeguards Act because of this uncertainty.²⁴

4.20 LGBTI Legal Service also argued that the potential for exposure of individuals or small not-for-profit organisations to cost orders from unsuccessful actions proved a deterrent to legal action being launched under the Safeguards Act. The submission noted:

The Service recognise that adverse cost orders are an important mechanism for minimising vexatious claims. However, the requirement to obtain Attorney-General approval was clearly designed to allow vexatious claims to be dispensed with without calling on the Federal Court's resources. With this protection in place, the Government should have taken action to minimise the risks and burden associated with community-initiated litigation. The Government could have done this by:

- Subsiding the litigation costs of approved applicants;
- Making a commitment to prosecute cases on behalf of approved applicants; or
- Legislating to modify the usual rule that 'costs go with the case'.²⁵

22 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 3*, p. 3.

23 LGBTI Legal Service, *Submission 40*, p. 2.

24 LGBTI Legal Service, *Submission 40*, p. 2.

25 LGBTI Legal Service, *Submission 40*, p. 3.

4.21 The Public Interest Advocacy Centre (PIAC), in a submission also endorsed by the Community Legal Centres NSW, observed that the requirement to obtain the consent of the Attorney-General before action can be taken under the Safeguards Act as 'unnecessarily and inappropriately politicis[ing] the protection of rights under the Safeguard[s] Act'. Furthermore, PIAC commented on the three month time limit for making applications noting that 'this time limit is far too short'.²⁶ This was particularly so given that:

...most people invested in the public debate surrounding this issue were focused on the subsequent parliamentary debate until the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* on Thursday 7 December 2017, and the intervention of end-of-year/summer holidays, it is an unreasonably short timeframe for applications to be prepared and lodged.²⁷

4.22 Dr Kevin Bonham posited that section 15(1) of the Safeguards Act, which relates to vilification, is not clear on what constitutes a 'view on the marriage law survey question'. Dr Bonham explained:

The meaning of the terms "a view in relation to the marriage law survey question" and "his or her views about the marriage law survey question" is insufficiently clear, especially in a debate in which people are frequently making comments about same-sex parenting (or on the other side sometimes, religious institutional child abuse) that lack any clear connection to the survey question but that strongly appear to be aimed at influencing the vote.²⁸

4.23 Some submissions highlighted the effectiveness of the Tasmanian *Anti-Discrimination Act 1998* in reducing the incidence of vilification on the basis of sexual orientation, gender identity, intersex status, and relationship status.²⁹

Government responses to complaints

4.24 On 7 September 2017, Mr Paul Pirani, Chief Legal Officer at the Australian Electoral Commission (AEC) told the committee that if the *Marriage Law Survey (Additional Safeguards) Act 2017* simply extended the current provisions under the electoral act that this would not stop people from publishing or distributing offensive material, it would merely ensure that it was properly authorised. Mr Pirani explained:

If the provisions [of the *Marriage Law Survey (Additional Safeguards) Act 2017*] were to mirror what's in the Electoral Act, it still wouldn't deal with the actual content. All it would deal with is making sure people are aware of who has authorised it and who has caused it to be published, and if a person believes they have been defamed, or some other illegal action has

26 Public Interest Advocacy Centre and Community Legal Centres NSW, *Submission 34*, p. 9.

27 Public Interest Advocacy Centre and Community Legal Centres NSW, *Submission 34*, pp 9–10.

28 Dr Kevin Bonham, *Submission 12*, p. [2].

29 See, for example: Tasmanians United for Marriage Equality, *Submission 35*: just.equal, *Submission 32*.

occurred in relation to the advertisement, then they would be able to take their own legal action, including to state antidiscrimination boards that have jurisdiction in dealing with racial vilification and those type of matters, but it isn't a matter that falls within the jurisdiction of the AEC.³⁰

4.25 At the committee's public hearing on 15 September, Ms Samantha Palmer, General Manager, People, Culture and Communication Division at the ABS informed the committee that approximately 4 per cent of 87 000 telephone calls to the postal survey call centre were complaints, equating to 3 480 complaints.³¹ Mr Tom Rogers, Australian Electoral Commissioner, noted at a Supplementary Estimates hearing in October that 'as at 10 October, we'd received 615 complaints about the survey authorisation and other issues', of which most related to 'authorisation'.³² Mr Pirani explained that he was directly involved in dealing with 160 of these complaints:

We responded to the complainant in each of those [615 complaints]. There were a couple of matters that were escalated to me that I took action on in relation to making contact to the owner of websites, ensuring that the authorisation details required by section 6(5), were included on those websites. There was one matter that I escalated to Facebook, and the lawyers for Facebook went through a process that I understand last week resulted in that particular page being brought down and blocked for access in Australia.³³

4.26 Mr Pirani told the committee about the types of authorisation issues the AEC was dealing with described the issues around authorisation and the AEC's approach in dealing with them:

[Where there are no] authorisation details, and we had no way of identifying who the person behind that was. In relation to most of the websites, it is reasonably accessible to be able to ascertain who the contact persons are, and there are a number of internet search tools to enable you to locate them. I have been sending emails and I've had nearly 100 per cent success rate in having authorisation details added.³⁴

4.27 Mr Pirani also explained his role in establishing precedents that allowed the complaints team to action subsequent similar complaints:

Most complaints come into the AEC at our info@ address, and we have a filtering process where some of them might come to me first to create a

30 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Official Hansard*, 7 September 2017, p. 6.

31 Ms Samantha Palmer, General Manager, People, Culture and Communication Division, Australian Bureau of Statistics, *Official Hansard*, 15 September 2017, p. 18.

32 Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, p. 176.

33 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, p. 177.

34 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, p. 177.

precedent. I'll give you an example: the first robocall that went out from Equality Australia led to a large number of complaints that didn't have the correct authorisation details. I dealt with the first one of those and, after that, the information team responded to the others. We had the skywriting incident. The first one of those came to me, I provided a form of words, and then the info team dealt with the rest of those.³⁵

4.28 Mr Rogers observed that this approach was consistent with the AEC's role during elections, however pointed out that there are a number of limitations that make the survey process different to a regular election:

...at election time, generally speaking, if we phone one of the political players and say there's an issue, it's invariably a mistake and they fall over themselves to fix it very quickly. In this particular case, it can be difficult, if you've got some parties that are brand-new to the process.³⁶

4.29 The safeguards failed to engage with the circumstances that distinguished the postal survey from a general election – namely the involvement of protagonists without any ongoing incentives for compliance with norms and laws that govern elections.

4.30 Mr Pirani explained:

The other issue is: they aren't cogent entities. Unlike dealing with a political party where I've got a registered office and contact details et cetera, to identify and locate some of the disparate groups out there campaigning is extremely difficult.³⁷

4.31 Mr Pirani informed the committee that he was only aware of four instances where a complainant was provided with the contact details for the Attorney-General's Department where a complaint related to an allegation of vilification or discrimination.³⁸

4.32 Section 19 of the *Marriage Law Survey (Additional Safeguards) Act 2017* provided that if a person wanted to take civil legal action against someone alleged to have engaged in vilifying, intimidating or threatening behaviour, they must first seek the consent of the Attorney-General.³⁹ At the Supplementary Estimates for the Legal and Constitutional Affairs Legislation Committee, the then Attorney-General,

35 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, pp 177–178.

36 Mr Tom Rogers, Australian Electoral Commissioner, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, p. 180.

37 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, p. 180.

38 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Estimates Official Hansard*, 24 October 2017, p. 180.

39 See: *Marriage Law Survey (Additional Safeguards) Act 2017*, s. 15 & 19.

Senator the Hon George Brandis told the committee that no requests for consent had been to him at that time.⁴⁰

4.33 There are doubts as to whether this represents a complete picture of the complaints the public would have wished to make about the process. The ABS has given evidence during Senate estimates hearings that it did not have a formal protocol for handling complaints until sometime after the postal survey. The division of responsibility for responding to complaints between multiple agencies (including the AEC, ABS, Attorney-General's department, and Australia Post) meant that there was no clear process for members of the public to report concerns.⁴¹ There was also no clear mandate provided to frontline staff to document, pursue and elevate complaints.

40 Senate Legal and Constitutional Affairs Legislation Committee, *Estimates Official Hansard*, 24 October 2017, pp 176–177.

41 See Senate Economics Legislation Committee, *Estimates Official Hansard*, 25 October 2017, pp 125–131.