

Chapter 1

Introduction

1.1 On 23 March 2017 the Senate referred the provisions of the Human Rights Legislation Amendment Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 28 March 2017.¹

1.2 The Selection of Bills Committee could not reach agreement about the referral of the bill to the committee for inquiry.²

1.3 In the adoption of the Selection of Bills report by the Senate, Senator Katy Gallagher moved an amendment referring the bill to the committee with a reporting date of 9 May 2017.³

1.4 However, Senator the Hon Mitch Fifield, the Minister for Communications and the Arts, successfully moved an amendment to Senator Gallagher's amendment, to bring forward the reporting date to 28 March 2017.⁴

Background to the bill

1.5 In considering this bill, the committee has drawn on the substantial and extensive work done by the Parliamentary Joint Committee on Human Rights (PJCHR) in its inquiry into Freedom of Speech in Australia, which was tabled in Parliament on 28 February 2017.⁵

1.6 The committee thanks witnesses who appeared on short notice at the committee's request. The committee considered inviting a wider range of witnesses however, in light of the inquiry's subject-matter having been comprehensively canvassed in the PJHRC inquiry, decided on a limited list. The committee noted that widening the list of witnesses would have necessarily required that all interested parties be invited to appear, in which case this inquiry would have substantially duplicated the PJHRC inquiry, which this committee was at pains to avoid. The committee was keen to hear evidence on the processes being amended by the bill, rather than on the substantive issues that had already been canvassed as part of the PJHRC inquiry.

1 *Proof Senate Hansard*, 23 March 2017, pp. 34–35.

2 Selection of Bills Committee, *Report No. 3 of 2017*, 23 March 2017, Appendix 5.

3 *Proof Senate Hansard*, 23 March 2017, p. 30.

4 *Proof Senate Hansard*, 23 March 2017, pp. 30–31.

5 Parliamentary Joint Committee on Human Rights (PJCHR), *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth) (Freedom of Speech)*, 28 February 2017.

1.7 In introducing the bill, Senator the Hon George Brandis QC, Attorney-General, provided background to the PJCHR inquiry, and outlined the wide consultation it undertook in formulating its 22 recommendations to government:

On 8 November 2016, the PJCHR was asked to inquire into and report on two issues relating to freedom of speech in Australia. This reference was made in response to growing public concern about the effect of section 18C of the Racial Discrimination Act on freedom of speech, and the complaints handling procedure of the Commission.

The concern arose following certain high profile cases, namely, a cartoon by the late cartoonist Mr Bill Leak which was published in The Australian newspaper on 4 August 2016, and a case concerning students from the Queensland University of Technology posting comments on a Facebook page about having been refused access to a computer lab for Indigenous students.

The PJCHR received 11,460 items (consisting of submissions, form letters and other pieces of correspondence), and held nine public hearings in each state and territory.

The PJCHR's majority report made 22 recommendations; most concerned the Commission's complaints-handling processes. The Committee did not reach a concluded view on the appropriate wording of section 18C. Rather, it put forward a range of proposals that had the support of at least one committee member.⁶

1.8 In the second reading speech introducing the bill to the Senate, the Attorney-General noted that the bill would fulfil some of the recommendations of the PJCHR report:

The Human Rights Legislation Amendment Bill will reform section 18C of the *Racial Discrimination Act 1975* and amend the complaints handling processes of the Australian Human Rights Commission (the Commission).

The Bill will give effect to the recommendations of the [PJCHR] in its report on *Freedom of Speech in Australia*, which was tabled on 28 February 2017.

The Bill will also make minor technical amendments to the Commission's reporting and conciliation requirements, as well as its governance arrangements. These minor amendments were requested by the President of the Commission to improve efficiency and reduce regulatory burden in how the Commission exercises its jurisdiction.⁷

Timeframe for this inquiry

1.9 In support of the timeframe for this inquiry, Senator Brandis stated:

6 *Proof Senate Hansard*, 22 March 2017, pp. 73-74.

7 *Proof Senate Hansard*, 22 March 2017, p. 73.

The reason the government does not favour a seven-week Senate inquiry is because the ink is barely dry on a three-month parliamentary inquiry which only reported 23 days ago on 28 February. That parliamentary inquiry—an inquiry of members of both the Senate and the House of Representatives—held nine days of public hearings, in every capital city in Australia, over the course of some 2½ months. The very thing the Parliamentary Joint Committee on Human Rights inquired into was the issues in this bill, and this bill was drafted to give effect to those recommendations, particularly in relation to amendments to the *Australian Human Rights Commission Act*.⁸

1.10 When the bill was being referred to the committee, Senator Fifield told the Senate that the PJCHR had consulted effectively with a wide range of stakeholders, and so:

I think what we have seen by way of the Parliamentary Joint Committee on Human Rights, the referral it had and the work that it did is a model of good process—a model of good examination of the issues that are raised by people in the community, who, we recognise, can legitimately have different points of view.

We firmly believe that the legislation that we are proposing does reconcile appropriate protections for individuals and freedom of speech, which is something that we on this side hold to be one of the fundamental underpinnings of a free and pluralistic society. It is for those reasons that we do not believe that there is the need for an inquiry of the length proposed by those opposite. We think that there is adequate time to address this legislation by 28 March, largely because of the very good work done by the human rights committee.⁹

1.11 A number of other senators spoke in favour of the short timeframe of this inquiry into the bill, given the extensive and rigorous work done by the PJCHR, including Senator Derryn Hinch, Senator Malcolm Roberts, and Senator Nick Xenophon.¹⁰

Financial implications

1.12 The Explanatory Memorandum includes a financial impact statement that notes the bill would have a nil or insignificant financial impact on Commonwealth Government departments and agencies.¹¹

8 *Proof Senate Hansard*, 23 March 2017, p. 33.

9 *Proof Senate Hansard*, 23 March 2017, p. 30.

10 See speeches made in the Senate by senators Hinch, Roberts and Xenophon, *Proof Senate Hansard*, 23 March 2017, p. 34.

11 *Explanatory Memorandum*, p. 10.

Compatibility with human rights

1.13 The Explanatory Memorandum states that the bill is compatible with Australia's human rights obligations.¹²

Conduct of the inquiry

1.14 Details of the inquiry were advertised on the committee's website, including a call for submissions by 12 noon on Monday 27 March 2017.¹³ In this, the committee noted that they had access to submissions received by the PJCHR, and would only consider new evidence provided by submitters.

1.15 The committee received eleven submissions, which are listed at appendix 1 of this report. These submissions are available in full on the committee's website.

1.16 The committee held a public hearing in Canberra on 24 March 2017 to hear from a number of witnesses. A full list of these witnesses can be found at appendix 2 of this report, and the Proof Hansard transcript of evidence is attached to this report at appendix 3.¹⁴

Structure of this report

1.17 This report consists of one chapter and an appendix of evidence gathered by the committee:

- This chapter provides a brief background and overview of the bill and details of the administrative details of the inquiry. It also discusses the evidence heard by the committee on the bill, as well as the committee's views and recommendations.
- Appendix 3 of this report contains the Hansard transcript of evidence from the public hearing on 24 March 2017.

Acknowledgements

1.18 The committee thanks all organisations and individuals that participated in this inquiry, particular given the tight reporting deadline.

Purpose and overview of the bill

Purpose of the bill

1.19 The Explanatory Memorandum states that the bill would amend two acts as:

12 *Explanatory Memorandum*, p. 11.

13 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs

14 Note: the Hansard transcript can also be accessed at the committee's website.

...it contains measures to reform section 18C of the *Racial Discrimination Act 1975* (the RDA), to amend the complaints handling processes of the Australian Human Rights Commission (the Commission) under the *Australian Human Rights Commission Act 1986* (the AHRC Act) and to make minor amendments to the AHRC Act sought by the Commission to enhance its operation and efficiency.¹⁵

1.20 In this, the Explanatory Memorandum explains that the bill would give effect to recommendations made by of the PJCHR report, most importantly:

The amendments in relation to complaints handling processes give effect to the majority of the recommendations of the Parliamentary Joint Committee on Human Rights (PJCHR) in its report on Freedom of Speech in Australia, which was tabled in the Parliament on 28 February 2017.¹⁶

Reforms to section 18C

1.21 In his Second Reading Speech, the Attorney-General outlined the function and history of section 18C of the RDA:

Section 18C makes it unlawful to do an act, otherwise than in private, that is reasonably likely to offend, insult, humiliate or intimidate another person or group of people on the basis of their race, colour or national or ethnic origin.

Section 18D of the Racial Discrimination Act exempts the application of section 18C to anything said or done reasonably and in good faith in certain specific contexts in the public interest, such as in the making of an artistic work.

These sections were inserted into the Racial Discrimination Act in 1995 by the Racial Hatred Act. Complaints of breaches of section 18C, like all complaints of unlawful discrimination, are received by the Commission, which must inquire into, and attempt to conciliate them. The Commission is not empowered to decide on or determine complaints. If a complaint is unable to be resolved, it may be terminated. Once a complaint is terminated, a complainant may make an application to the Federal Court or the Federal Circuit Court alleging unlawful discrimination within 60 days of termination.¹⁷

1.22 The Explanatory Memorandum outlines how the bill would amend section 18C by redefining conduct it currently prohibits, as well as introducing a reasonable person test as the objective standard to judge potential contraventions:

The Bill will amend Part IIA of the RDA to redefine conduct prohibited by section 18C, to ensure that the defined conduct more accurately encompasses the notion of racial vilification. The words offend, insult,

15 *Explanatory Memorandum*, p. 2.

16 *Explanatory Memorandum*, p. 2.

17 *Proof Senate Hansard*, 22 March 2017, p. 73.

humiliate will be removed from paragraph 18C(1)(a) and replaced by the word harass. The word intimidate will remain. The Bill will also introduce 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.¹⁸

1.23 According to the Explanatory Memorandum, these provisions would balance the protection of individuals from racial vilification, while preserving the right to free speech. It states:

The law should provide protection from racial vilification...However, this protection needs to be consistent with the right to freedom of speech, which is fundamental to the strength and health of our liberal democracy. Effective protection against racial vilification need not curtail freedom of speech. However section 18C in its current form potentially does so, without providing any extra protection from racial vilification. As well, section 18C fails to protect against racial harassment—an essential element of protection against racial vilification.¹⁹

1.24 The Explanatory Memorandum explains why the current terminology is not fit-for-purpose:

The Government considers that the words offend, insult, humiliate do not protect people from racial vilification. Rather, they target the expression of ideas and opinions, particularly those which may be controversial or challenging. Section 18C must be amended to address the disconnect between the ordinary meaning of the words offend, insult, humiliate and the way they have been judicially interpreted.

6. The new test of whether a public act harasses or intimidates a person or a group of people on the basis of their race, colour or national or ethnic origin will focus on the vice at the heart of racial vilification. It will protect individuals from genuine racial vilification, not simply from mere slights, without limiting – whether directly or by a chilling effect – freedom of speech. The amendments restore the appropriate balance between freedom from racial discrimination and freedom of speech, allowing people to express their opinions without fear of unreasonable legal sanctions, providing they do not engage in vilification.²⁰

1.25 Importantly, this amendment of terminology also fulfils Australia's international conventions obligations, under its commitment to the Convention on the Elimination of All Forms of Racial Discrimination (CERD).²¹

18 *Explanatory Memorandum*, p. 2.

19 *Explanatory Memorandum*, p. 2.

20 *Explanatory Memorandum*, p. 2.

21 *Explanatory Memorandum*, p. 3.

Reforms to the Australian Human Rights Commission's complaints procedures

1.26 The Explanatory Memorandum sets out that the resolution of disputes is one of the Commission's core functions :

The successful functioning of the Commission provides access to justice for the most disadvantaged members of Australian society, reduces the burden on the courts and plays an educative role in enabling individuals and organisations to better understand their rights and responsibilities.²²

1.27 The bill is designed to improve this function in several ways. The Attorney-General noted in his second reading speech that it included measures to provide:

- for the Commission to act fairly in the course of inquiring into, and attempting to conciliate a complaint. This extends to offering reasonable assistance to complainants and respondents;
- for the President or the Commission to act expeditiously when dealing with complaints, and to use best endeavours to dispose of complaints within 12 months;
- that the President [must] notify any respondents to a complaint, and any person other than the respondent who is the subject of an adverse allegation in the complaint;
- a raised threshold for lodging a complaint of unlawful discrimination. At the moment a complaint can constitute as little as a bare allegation in writing that unlawful discrimination has occurred. It is an inefficient use of the Commission's time and resources to dispose of such complaints;
- a greater ability for the Commission to terminate unmeritorious complaints, including by introducing new mandatory and discretionary grounds upon which a complaint can be terminated by the President; and
- that the President is required to consider whether to terminate a complaint before starting to inquire into the complaint, and the legislation will make clear that regard must be had to any relevant exemptions when considering whether a complaint constitutes unlawful discrimination.²³

1.28 However, the Explanatory Memorandum notes that the Commission's current complaints model may not identify unfair cases early enough, and so cannot eliminate them as soon as possible. To address this, it states that:

The amendments in this Bill will apply to all unlawful discrimination complaints made to the Commission, not just those under section 18C of the RDA.

22 *Explanatory Memorandum*, p. 3.

23 *Proof Senate Hansard*, 22 March 2017, p. 73.

The Bill will 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. The amendments will ensure the Commission accords procedural fairness to each party to a complaint, including by requiring the Commission to appropriately notify respondents of the existence of a complaint against them, and requiring the Commission to resolve complaints in a timely manner.²⁴

Additional amendments requested by the Commission

1.29 The bill would also enact amendments that have been requested by the Commission itself, to improve its regulatory and administrative functions, as well as clarifying its conciliation process and governance arrangements.

1.30 Of these amendments, the Commission submitted that:

The Commission welcomes the majority of the proposed amendments in Schedule 2. Many of these are based on recommendations made by the Commission to the Parliamentary Joint Committee on Human Rights (PJCHR) during its inquiry into *Freedom of Speech in Australia*, and other recommendations the Commission has previously made to Government. Of the 59 items in Schedule 2, the Commission supports 50 of them.²⁵

Committee view

1.31 The committee has found that this bill will make overdue reforms to the RDA, strengthening the protections against hateful speech based on race, colour or national or ethnic origin on one hand, and enhancing the rights to freedom of speech that all Australians enjoy on the other.

Section 18C changes

1.32 Recommendation 3 of the PJCHR recommended the removal of 'offend, insult, humiliate' from section 18C of the RDA. Removing the words 'offend, insult, humiliate' will address the disconnect between the ordinary understood meaning of these terms and the way that they have been judicially interpreted. These terms reflect conduct which merely wounds the feelings of a person, rather than conduct which threatens a person or reduces their dignity. Although offend, insult and humiliate may have been interpreted to incorporate a high standard of conduct, the subjectivity of these terms and the disconnect from their ordinary meaning has had a chilling effect on freedom of speech.

24 *Explanatory Memorandum*, p. 3.

25 *Submission 1*, p. 1.

1.33 The term 'harass' was recommended by the PJCHR.²⁶ 'Harass' also reflects the recommendations of the National Inquiry into Racist Violence, conducted in 1991, by the then-Human Rights and Equal Opportunity Commission. This was a basis for the introduction of the *Racial Hatred Act 1995* by the Keating Labor Government. The National Inquiry specifically recommended that the RDA be amended to 'prohibit racist harassment'. The introduction of 'harass' is an appropriate broadening of the scope of the section in a way which does not impinge upon legitimate freedom of speech.

1.34 The introduction of the 'reasonable member of the Australian community' as the objective standard by which contravention of section 18C is to be judged, would re-instate the usual common law test. The 'reasonable member of the Australian community' is the appropriate standard by which to assess racial vilification. As former Justice Sackville AO QC highlighted to the PJCHR: 'Section 18C is too wide in its reach and places too much emphasis on the subjective responses of the targeted group, as distinct from objective community standards'.²⁷

Process Changes to the Commission

1.35 The PJCHR inquiry highlighted community concern about the Commission's ability to appropriately address unmeritorious complaints, reflecting a view that the complaints handling process is currently weighted in favour of complainants.

1.36 The legislation will raise the threshold for the Commission to accept a complaint, provide additional powers for the Commission to terminate unmeritorious complaints and limit access to the courts for unsuccessful complaints. The Bill will amend the *Australian Human Rights Commission Act 1986* to ensure that all relevant parties to a complaint—the complainant, respondent and persons who are the subject of adverse allegations—are accorded natural justice. This includes requiring the President to notify those subject to an adverse allegation about the existence of a complaint and to act expeditiously in resolving complaints, with a view to finalising complaints within 12 months.

1.37 Minor technical amendments identified by the Commission itself are also included to improve the Commission's reporting obligations, its conciliation processes, and governance arrangements. These technical amendments remove mandatory Commission reporting and tabling obligations, including the Social Justice Report, Native Title Report, Children's Commissioner's report, complaints of human rights breaches, and complaints of breaches in equal opportunity in employment. These changes would allow the Commission to allocate limited resources to higher priority work, and where requested by the President of the Commission.

26 See PJCHR, *Freedom of Speech*, Recommendation 3(c).

27 Document tabled at a public hearing in Sydney on 1 February 2017 by Justice Ronald Sackville AO SC - Opening statement, 1 February 2017, p. 2.

1.38 Although this inquiry has been short, it has been able to consider these issues, in light of the report the PJCHR tabled only a few weeks ago, on 28 February 2017. This was based in long and rigorous consultation with a wide range of stakeholders across Australia, and came to comprehensive and considered conclusions.

1.39 Moreover, it will enhance the administering of the AHRC Act to address current imbalances in the Commission's processes for handling of complaints. This would ensure that baseless or frivolous claims are terminated quickly, sparing respondents from suffering the undue and unfair personal and financial costs of cases brought without due grounds.

1.40 This bill would enact some of the recommendations of the PJCHR report, including many that were instigated at the request of the Commission, to improve its administrative functions and its governance arrangements.

1.41 The committee has also formed the view that, where appropriate and practicable, changes to the complaints-handling procedures of the Commission that are contemplated in the bill should be extended to existing, as well as new, complaints.

1.42 For the benefit of debate in the chamber of the Senate on this bill, the committee has attached a copy of the Hansard transcript of the hearing it held in Canberra on 24 March 2017, and also refers the Senate to other material considered by the committee in this inquiry including submissions.

1.43 However, the committee considers it worthwhile to draw attention here to one particular issue for consideration by the government, to improve the future interpretation of some of this bill's proposed provisions. In the public hearing, some witnesses argued that the term harassment was not sufficiently defined in the Explanatory Memorandum. Given this term is central to the amendments made by the bill, the committee considers that the government could consider explaining this term more fully, so as to give direction to interpretation in the future.

Recommendation 1

1.44 The committee recommends that the bill be passed.

**Senator David Fawcett
Chair**