Labor Senators—Dissenting Report

1.1 This Bill makes significant changes to the *Racial Discrimination Act 1975* (the RDA) and to the *Australian Human Rights Commission Act 1986* (the AHRC Act).

Inadequate time for reporting

1.2 The Bill was introduced to the Senate on Wednesday 22 March 2017, and referred to Senate Legal and Constitutional Affairs Committee the next day. Labor moved a sensible time for reporting of 9 May 2017 to allow a rigorous yet timely inquiry process, but the government worked with crossbenchers to shut down a proper inquiry, and instead demanded that the committee report on Tuesday 28 March 2017.

1.3 Highly truncated public hearings were held on the morning of Friday 24 March 2017, less than 48 hours after the inquiry was announced. No Indigenous Australians or representative bodies were invited to appear before the committee. This is despite the availability of the Aboriginal Legal Service, ACT/NSW (ALS) who sought to be heard during the hearing. Government members of the committee denied the ALS the opportunity to speak, despite objections from Labor members of the committee. This is yet another disgraceful example of arrogance on the part of this out of touch government.

No compelling arguments for amendments to section 18C

1.4 No compelling arguments have been made for either of the two changes to section 18C proposed in schedule 1 of the bill. The proposal to remove the words 'offend, insult, humiliate' and replace with 'harass', and the proposal to create a new objective standard for determining a breach of section 18C weaken existing protections for Australians against racial hate speech and racial discrimination.

Removal of 'offend, insult, humiliate'

1.5 Schedule 1 of the bill proposes an amendment to the RDA to replace the words 'offend, insult, humiliate' and replace them with the term 'harass'. At present, section 18C makes it unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

1.6 This proposed change reduces the protections that are afforded to victims of racial discrimination and racial hate speech by narrowing the scope of behaviour that may constitute offending conduct.

1.7 The Federal Court has recognised the difficulties with section 18C applying to offensive, insulting and humiliating acts by interpreting it so that it only applies to 'profound and serious effects, not to be likened to mere slights'.[1]

1.8 It is unclear why the government has chosen to remove the word 'humiliate' when controversy has generally only focused on the words 'offend' and 'insult'. The government has set out no clear policy rationale as to why the word 'harass' has been chosen instead of other options, like 'vilify' or 'degrade'.

1.9 It is unclear how the work 'harass' will be defined. The Law Council of Australia raised concerns during the public hearing that 'harass' could denote proximity between two people and therefore not cover situations where racial hate speech is used, for example, in a media article.[2]

1.10 It is also unclear if it is the government's intention to bring section 18C into line with the Federal Court's interpretation of the scope of conduct that can be the subject of complaints to the Australian Human Rights Commission for engaging in racial discrimination.

1.11 If passed, the changes to section 18C would result in a period of uncertainty about the scope of the new provision, with a period of litigation required to settle the ambit of the new test.

1.12 Labor does not support any changes to weaken protections against racial hate speech, and opposes any change to 18C of the RDA that would have this effect. It is almost certain that these changes would have this effect.

1.13 The provisions of 18D ensure that Australia's laws prohibiting racial discrimination do not unduly restrict freedom of speech, and accordingly the changes to the scope of section 18C are entirely unnecessary to protect freedom of speech.

The new objective test in section 18C of the RDA

1.14 The Bill also introduces 'a reasonable member of the Australian community' as the objective standard for determining a breach of section 18C, instead of the objective test that the Court currently applies; that is whether an act is 'reasonably likely, in all the circumstances' to have the relevant effect.

1.15 The current test enables the Court to take into account the relevant context, for example, whether racial vilification is directed towards people of a particular race, in assessing whether it is reasonably likely that that group would be offended, insulted, humiliated or intimidated. The Court may also take into account evidence that a member of a particular racial group was in fact offended by the conduct in question. However, it is important to note that this evidence is admissible on, but not determinative of, the issue of contravention.

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1 *Creek v Cairns Post Pty* (2001) 112 FCR 352, 356 [16] per Kiefel J; see also *Jones v Scully* (2002) 120 FCR 243, 269 [102].

2 Ms Fiona McLeod, President, Law Council of Australia, *Proof Senate Hansard*, 24 March 2017, p. 34.

1.16 The reason for the government's proposed changes is entirely unclear and the committee received no substantive evidence to support the change. Labor members of the committee consider that the proposed new objective test would likely prevent the Court from taking into account the perspectives of particular racial or ethnic groups, and notes that the proposed amendment has been criticised by the Law Council of Australia, ethnic communities, and a number of others.[3]

Recommendation 1

1.17 Labor members of the committee recommend that schedule 1 of the bill be removed entirely.

Procedural changes to the AHRC Act

The bill proposes a number of changes to the complaints handling processes of the Australian Human Rights Commission set out in the ARHC Act. It is important to note that the procedural changes would apply to *all* complaints to the Australian Human Rights Commission, not just those under section 18C. This means that these changes will impact thousands of people with disabilities making complaints under the *Disability Discrimination Act 1992*, older people lodging complaints under the *Age Discrimination Act 2004*, those bringing actions under the *Sex Discrimination Act 1984*, as well as to people bringing complaints under other provisions of the RDA. The respondents to those claims will also be affected by these changes. Yet the Government has made no attempt to consult with these affected groups before seeking to ram these changes through the parliament. The majority of these amendments are welcomed by the Commission and are based on recommendations by the Commission to the Parliamentary Joint Committee on Human Rights (PJCHR) inquiry into *Freedom of Speech in Australia*.

1.18 However, in evidence the Commission raised concerns about a number of items in the bill on the basis that they do not adequately reflect the recommendations of the PJCHR, would result in additional red tape for the Commission, would be likely to cause additional delay and added costs for parties to complaints, and would impede access to justice in relation to meritorious complaints.[4]

1.19 These changes will impact on thousands of complainants and respondents who use the Commission's complaint handling services each year, and should be subject to amendment or removal from the bill.[5] The need to apply the new procedures to all current matters will impose an enormous burden on the Commission, which is already struggling for resources as a consequence of repeated cuts to its funding by this Government. The effect of this retrospectivity will therefore be the

3 Ms Fiona McLeod, President, Law Council of Australia, *Proof Senate Hansard*, 24 March 2017, pp. 34–35; see also Prof Gillian Triggs, p. 25;

4 Professor Gillian Triggs, President, Australian Human Rights Commission, *Proof Senate Hansard*, 24 March 2017, pp. 27–28.

5 Professor Gillian Triggs, President, Australian Human Rights Commission, *Proof Senate Hansard*, 24 March 2017, pp. 27–28.

opposite of the Bill's intent, increasing delays for both complainants and respondents engaged in complaint processes before the Commission.

1.20 Labor members of this committee are also concerned about changes in items 49 and 57 of Schedule 2, because these changes will undermine the efficacy of the conciliation process by allowing settlement offers made during those processes admissible as evidence in costs determinations should that matter proceed to court. This change is inconsistent with the confidentiality under which the alternative dispute resolution is carried out by the Commission. This would be a highly undesirable outcome, as it would significantly undermine the largely informal conciliation processes by which the large majority of matters currently the subject of complaints before the Commission are currently resolved. Once again, these procedural changes proposed by the Government are likely to increase costs and delays, rather than decreasing them.

1.21 Labor members are also very concerned about the impact of proposed items 31, 36 and 43, as well as items 27, 53. Proposed item 31 introduces a mandatory accept/reject phase into the Commission's process for dealing with complaints of unlawful discrimination. A similar regime is currently in place in Tasmania, which has caused additional delay and added costs for parties because it encourages them to litigate decisions made during the conciliation phase of complaint handling.

1.22 Proposed item 36 makes changes to the President's obligations to notify respondents, which does not reflect the recommendation of the PJCHR. It also inserts an obligation to notify a person who is 'the subject of an adverse allegation', which is likely to be onerous and appears unnecessary, particularly at an early stage when complaints may be dismissed. It also inserts a requirement that the President act 'fairly' and 'expeditiously' in dealing with complaints, which could be enforceable in Court or may affect the President's obligation to observe rules of natural justice.

1.23 Proposed item 43 introduces a mandatory termination provision, which could have the effect of encouraging parties to a complaint to engage in judicial review of a decision to terminate or not to terminate on this ground during the complaint handling stage. As has been the case in Tasmania, Labor members of the committee consider that this would be likely to lead to additional delays and added costs for parties to complaints, undermining the purpose of the Commission to provide a free, informal means to resolve complaints under the RDA.

1.24 The language of this proposed provision is also unclear. Subsection 46PH(1) of the AHRC Act already permits the President to terminate a complaint on the basis that there is no reasonable prospect of the matter being settled by conciliation.

1.25 Labor members of the committee note that the Commission gave evidence to the committee that, in their current form, proposed items 27 and 53 may have undesirable unintended consequences and should be amended.

Recommendation 2

1.26 The procedural changes contained in schedule 2 of the bill proceed only with significant amendments to ensure that they do not increase red tape, delays, and costs, or reduce access to justice.

Senator Louise Pratt
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