The Senate

Legal and Constitutional Affairs Legislation Committee

Human Rights Legislation Amendment Bill 2017

March 2017

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Recommendation 1

1.44 The committee recommends that the bill be passed.

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.

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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:

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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]

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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:

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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,

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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]

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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.

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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.

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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.

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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

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
Deputy Chair

Australian Greens—Dissenting Report

1.1 The Senate Inquiry into the Human Rights Legislation Amendment Bill 2017 received eleven submissions with the majority coming from organisations representing multicultural groups and lawyers with expertise in human rights.

1.2 Despite the evidence provided and concerns raised, the Chair's report recommends that this bill be passed.

1.3 Schedule 1 of the bill significantly amends the scope of 18C of the *Racial Discrimination Act 1975*.

1.4 A majority of submitters stated that the proposed changes to 18C that remove the words 'offend, insult, humiliate' and substitute 'harass' would weaken the current protections which exist against racial vilification in Australia.

1.5 Dr Emma Campbell, Director, Federation of Ethnic Communities' Councils of Australia stated in evidence to the committee that:

> Changing 18C and weakening the Racial Discrimination Act, as proposed in this bill, would grant a licence to those who want to undo Australia's great, harmonious, tolerant and cohesive multicultural society. The message would be clear: it is acceptable in Australia for one person to verbally attack another, to offend, insult and humiliate based on their race. After nine years of surveys, the Scanlon Foundation has found this year that experiences of discrimination in Australia on the basis of skin colour, ethnic origin or religion are at their highest levels. Put simply, the level of racism in this country is rising.[1]

1.6 The Human Rights Law Centre submitted, in relation to the proposed amendment to introduce a reasonable person test:

> The current objective standard of a reasonable member of the relevant racial group is being applied sensibly by the courts and should be retained as part of section 18C of the RDA. To change the test to 'a reasonable member of the Australian community', as proposed in the Human Rights Legislation Amendment Bill 2017, would weaken legal protections against racial vilification and risk reinforcing prejudice, particularly against unpopular racial minorities.[2]

1.7 The Law Council of Australia submitted:

> ….sections 18 and 18D of the RDA, as interpreted by the Courts, strike an appropriate balance between freedom of expression and protection from racial vilification, and should not be amended.[3]

1.8 The Australian Greens share these concerns and are opposed to any changes to 18C.

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1 *Submission 1*, p. 1.

2 *Submission 2*, p. 1.

3 *Submission 8*, p. 4.

1.9 The Schedule 2 amendments propose reforms to the *Australian Human Rights Commission Act 1986.*

1.10 The Australian Human Rights Commission, while welcoming the majority of the proposed amendments, submitted that nine of the items:

> ...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]

1.11 Their main concerns include the requirement that the Australian Human Rights Commission notify a person who is not a respondent but who is the subject of an adverse allegation, the proposed mandatory accept/reject phase, and that matters discussed during conciliation should remain confidential.

1.12 Professor Gillian Triggs, President of the Australian Human Rights Commission, in evidence explained the implications of an accept/reject phase:

> If it injects a legal challenge process in the middle of it then immediately you go from a free, confidential process of conciliation to a potentially expensive and lengthy process of judicial determination. We think that that is a retrograde step and that it will retard the ability for the commission to get what at the moment amounts to a 76 per cent success rate of conciliations.[5]

1.13 In relation to the confidentiality issue the Australian Human Rights Commission submitted:

> If the parties were aware that any offer they make during or receive during the course of a conciliation conference could be later tendered in legal proceedings on the question of costs, they would be less likely to engage meaningfully in the Commission's conciliation process.[6]

Recommendation 1

1.14 That Schedule 1 be rejected by the Senate.

Recommendation 2

1.15 That Schedule 2 be amended to reflect the recommendations of the Australian Human Rights Commission.

Senator Nick McKim
Australian Greens

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4 *Submission 1*, p. 1.

5 *Proof Senate Hansard*, 24 March 2017, p. 27.

6 *Submission 1*, p. 7.

Appendix 1

Public submissions

1 Australian Human Rights Commission
2 Human Rights Law Centre
3 Kingsford Legal Centre
4 Federation of Ethnic Communities' Councils of Australia
5 Multicultural Council of the Northern Territory Inc.
6 ANTaR
7 ACT Multicultural Council
8 Law Council of Australia
9 Amnesty International Australia
10 Dr Helen Pringle
11 Ethnic Communities' Council of Victoria (ECCV)

Answers to questions on notice

Friday 24 March 2017—Canberra

1 Australian Human Rights Commission - Answers to questions on Notice from 24 March 2017 (received 27 March 2017)

Appendix 2

Public hearings and witnesses

Friday 24 March 2017—Canberra

CAMERON, Ms Laura, Policy Officer, Human Rights Unit, Attorney-General's Department

CAMPBELL, Dr Emma, Director, Federation of Ethnic Communities' Councils of Australia

EDGERTON, Mr Graeme, Senior Lawyer, Australian Human Rights Commission

MARILLANCA, Mr Victor JP, Disabilities Chair, Federation of Ethnic Communities' Councils of Australia

McLEOD, Ms Fiona, President, Law Council of Australia

MOLT, Dr Natasha, Senior Legal Advisor, Law Council of Australia

MOSES, Mr Arthur, SC, Treasurer, Law Council of Australia

OPPERMANN, Mr Harry, Deputy Chair, Canberra Multicultural Community Forum

RAHMAN, Ms Diana OAM, Chair, Canberra Multicultural Community Forum

SOUTPHOMMASANE, Dr Tim, Race Discrimination Commissioner, Australian Human Rights Commission

SWINBOURNE, Ms Emma, Director, Human Rights Unit, Attorney-General's Department

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

WALTER, Mr Andrew, Assistant Secretary, Civil Law Unit, Attorney-General's Department

WALTERS, Ms Adrianne, Director, Legal Advocacy, Human Rights Law Centre

Appendix 3

Hansard Transcript of evidence from the committee's hearing on 24 March 2017

COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Human Rights Legislation Amendment Bill 2017

(Public)

FRIDAY, 24 MARCH 2017

CANBERRA

BY AUTHORITY OF THE SENATE

[PROOF COPY]

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Friday, 24 March 2017

Members in attendance: Senators Dastyari, Dodson, Fawcett, Hinch, Ian Macdonald, McKim, Pratt, Singh, Watt, Williams, Xenophon.

Terms of Reference for the Inquiry:

To inquire into and report on:

Human Rights Legislation Amendment Bill 2017.

WITNESSES

CAMERON, Ms Laura, Policy Officer, Human Rights Unit, Attorney-General's Department

SWINBOURNE, Ms Emma, Director, Human Rights Unit, Attorney-General's Department

WALTER, Mr Andrew, Assistant Secretary, Civil Law Unit, Attorney-General's Department

Committee met at 09:02

CHAIR (Senator Ian Macdonald): I declare open this meeting of the Senate Legal and Constitutional Affairs Legislation Committee. Today we are dealing with the Human Rights Legislation Amendment Bill 2017. These are public proceedings and are being broadcast live via the web. The committee has resolved to allow the media to be present at this hearing, but the media are aware of the rules in relation to their presence. I think all witnesses know it is unlawful to threaten or disadvantage a witness on account of evidence given to a committee, and any such action is treated by the Senate as a contempt. The committee prefers to take evidence in public, but, under the Senate's resolutions, witnesses have the right to request to be heard in camera if they believe there is some reason for that. It is important that witnesses give notice if they intend to do this, and then the committee will consider that. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist upon an answer, having regard to the ground which is claimed.

This hearing is about the amendment bill; it is not really about the issues of section 18C. They were considered at some length by a joint committee of the parliament over a period of 2½ months, so this committee is wanting to direct its attention specifically to the bill.

I think it is probably appropriate at this time just to make reference to Mr Bill Leak, a well-known cartoonist and a national figure, almost, in Australia. His untimely death raised the profile of this issue in relation to 18C and was part of the catalyst for this legislation which we are dealing with today. I think the committee will just note Mr Leak's untimely death, extend its condolences to Mr Leak's family. We hope that his passion for this particular issue and the legislation which has followed is in some recompense to his family of his contribution to public life in Australia in so many ways.

Senator WATT: On behalf of Labor senators I also acknowledge the extreme hurt that is caused to all Australians of non-Anglo-Saxon background whenever they experience racial humiliation, offence or insults.

CHAIR: I will now call upon our first witnesses who are from the department. The committee, I think, has resolved that we are having you on first because this was set up at short notice and you were the easiest to contact and get to come along. Unusually we are having you first. As you know we usually like to have the department last so they can address genuine issues that may have been raised by others in relation to the drafting of the bill or different issues that may or may not have been considered by the department which might come out in the evidence. The program is not quite right, the Law Council is from 12 to 12.30 and I suggested to the committee that at 12.30 we have someone from the department back just in case there are issues raised that require a response from the department. More specifically if someone says, 'Oh, this clause was badly drafted', or 'You didn't put this in the clause', I would just like someone from the department to actually say why that clause was not like that or why it was. If the committee is agreeable we will amend the program to read that 12 to 12.30, which was the original arrangement the Law Council would be on, and then at 12.30 to 12.45 we will have the department back just to respond to specific issues that may have been raised by some of the witnesses.

Senator PRATT: Chair, I raised with you last night about the possibility of attaching the Aboriginal Legal Service to some of the witnesses today. They could appear alongside the Human Rights Law Centre or FECCA, and we hope that they will be here shortly, so that that could be accommodated if the committee is agreeable.

CHAIR: The Human Rights Law Centre are appearing by teleconference. Would these be appearing by teleconference?

Senator PRATT: No, they will be here in person. As I discussed with you last night, even though this is a short inquiry and some of the issues have been canvassed in the previous joint inquiry, what has not been canvassed is the substantive legislation before us and it would be unwise to pretend this is any kind of meaningful consultation unless we have some Indigenous voices at the table.

CHAIR: We did discuss this yesterday. I think the committee was of the general view that we would not do that, because once you start having one group of any type, in this case an Indigenous group, who have a particular view then do you call other members of that same group who might have a different view? I think it was for that reason that we decided to restrict it to the ones we have. I think the committee discussed this yesterday and came to that conclusion.

Senator WATT: Chair, I would be more than happy if any committee member wishes to arrange by phone to have an Indigenous person who supports the changes to the law to come in. As I have communicated privately, I think it would be extremely unfortunate if we consider a far-reaching change to the Racial Discrimination Act, without inviting one Indigenous person to give evidence. I think that would be disgraceful, frankly.

Senator HINCH: Under normal circumstances I would agree with Senator Watt, but this is not a brand new hearing. We have had umpteen hearings. Everything to be said about 18C has been said over the months-long inquiries. There have been public hearings in cities all over Australia. Everybody in Australia has had a chance to put their view. All the views are known. This is a short-term thing; otherwise, I would normally agree with you, but on this one I do not agree.

CHAIR: I think you made that point very well yesterday, Senator Hinch. I think that is one of the reasons the committee so decided. This is about the legislation. It is not about the issue. The human rights—

Senator WATT: Government members decided that.

Senator HINCH: I am not a government member.

Senator WATT: No, you didn't have a vote.

CHAIR: I do not think Senator Hinch is a government member.

Senator WATT: He did not have a vote yesterday; government members did. Government members chose that, not opposition or Greens members of the committee.

CHAIR: We have the Human Rights Law Centre here to talk about the legislation. I think we will stand by the decision that the committee made yesterday.

Senator PRATT: I would like my objection recorded.

Senator WATT: And mine.

Senator DODSON: And mine.

CHAIR: Mr Walter, do you have an opening statement to make?

Mr Walter: No, Chair. We are just happy to take questions.

Senator PRATT: On what date were you first asked to draft the Human Rights Legislation Amendment Bill 2017?

Mr Walter: I think that would have been very shortly after the report from the PJCHR on the issue generally. I can tell you. It was 2 March 2017.

Senator PRATT: There was no work done prior to the tabling of the Parliamentary Joint Committee on Human Rights report on 28 February?

Mr Walter: To be very clear, of course we monitor the issue, we were involved in the hearing and we had been paying general attention to the issue; but, no, we did not start writing drafting instructions or anything like that.

Senator PRATT: Was the department asked to look at all of the recommendations for change or was it given only the harassment option by the minister to consider?

Mr Walter: The department went through all the recommendations in the report, but the government indicated its intention to, yes, go down the path that the bill currently reflects.

Senator PRATT: So the government did not ask you to look at the other recommendations in the report? It gave you only the harassment recommendation to draft? Clearly, you say you drew up details of all the recommendations. Did the government consider all of those?

Mr Walter: The government considered the report's recommendations. It made a decision to adopt that course of action, and then we went about doing the things that we do to draft legislation to give effect to that decision.

Senator PRATT: Did the government reflect on all of the options within the free speech report?

Mr Walter: I think that is probably a question you would have to put to the government itself. But, yes, it had the report in front of it.

Senator PRATT: So you were only asked to do work on the harassment option?

Mr Walter: The government went through the normal process of making a decision about the course of action it wanted to take and then we gave effect to that decision.

Senator PRATT: Yes—

Mr Walter: It is kind of a two-stage process. The government considered the report and made its decision as to which recommendations it wanted to take up, and then we went about implementing them.

Senator PRATT: But the only option the government asked you to take up, in terms of changes to 18C specifically, was the amendment to the harassment provision. Is that right?

Mr Walter: That was the government's decision, yes, so that is the one we went about implementing.

Senator PRATT: Clearly you cannot advise us what advice you gave to government, but the report was quite extensive. Did you provide a full briefing on the parliament's report, in terms of the options and ramifications of the kinds of issues that were raised in it?

Mr Walter: I think it is best described as an iterative process but, yes, there were various briefings in relation to the entirety of the report, including the 18C elements but also elements relating to the Human Rights Commission's processes.

Senator PRATT: In the main, I read that report as a general endorsement—it did not call for significant change to the provision. I would see this as something above and beyond what the report called for.

CHAIR: That is not a question; that is a statement. You do not have to answer that.

Senator PRATT: I am just trying to match the government's ultimate position to what seems to be a disconnect with the report itself. That is why I ask what kind of advice you provided.

CHAIR: It is not for public servants to guess what the government might or might not—

Senator PRATT: I understand that.

Mr Walter: The only thing I would say is that recommendation 3 of the report deliberately does not come down in one place or another. It canvasses a range of options which the government might want to take up. The government considered those options and took up two of the recommendations in particular in this space, which relate to using the word 'harass' and also to the 'reasonable person' test. So those things come out of the report, but—you are quite right—the report does not say, 'This is the specific direction you should go.' It canvasses a broad range of options reflecting what I think was a broad range of views in that committee.

Senator PRATT: It was unclear to me—and clearly you have advised me that I need to ask the government this—how much consideration they gave to the status quo or to the other options within the paper. Would you agree that this is the most significant change made to racial discrimination law in a number of decades?

CHAIR: Again, that is an opinion of a public servant.

Senator PRATT: It is not just an opinion. It is a matter of practical fact in relation to the drafting and the processes behind it.

CHAIR: If the witness wants to answer it, he can. But under our rules, as you know, questions relating to opinions should not be asked of public servants, who are there to do a job that the government of the day asks them to do.

Senator PRATT: When was the last time we had any dramatic change in the Racial Discrimination Act?

Mr Walter: Our instinct is probably to say 1995, but we can look in the act. The notes in the act will tell us the last time that those provisions were amended. We can quickly get that answer for you.

Senator PRATT: How old is the act itself? Would a consultation period of three working days between the introduction of a bill of this significance be normal practice?

Mr Walter: That is a very contextual question.

Senator WATT: When was the last time you saw that happen?

Mr Walter: It does actually happen surprisingly often when something occurs of great significance—a court decision is made that leads to a whole degree of uncertainty—

Senator WATT: Which has not happened here.

Mr Walter: I am just giving you an example. Where there is a clear degree of uncertainty that is generated by something, we might develop legislation very quickly, where there is a clear answer to something. But of course the government's view on this was that there had been an inquiry by the Parliamentary Joint Committee on Human Rights that had canvassed a whole range of issues. The government was forming its position on where to go with this and bringing it forward to the parliament.

Senator PRATT: Other reforms in this regard have had far more extensive consultation, have they not, in terms of previous governments when they have sought to amend the law?

CHAIR: That assumes Mr Walter, Ms Cameron or Ms Swinbourne were around in these other areas. You are again asking for—

Senator PRATT: All right. Who wrote the explanatory memorandum to this bill?

Mr Walter: As is usual practice, the department prepares a draft and it is settled by the minister—the Attorney-General, in this context.

Senator PRATT: The Attorney-General wrote the explanatory memorandum?

Mr Walter: As I said, we prepare a draft of the explanatory memorandum—that is the normal practice—and then it is settled by the relevant minister, which in this case is the Attorney-General, so some edits were made by the Attorney-General.

Senator PRATT: When did you provide the draft of the explanatory memorandum to the Attorney-General?

Ms Swinbourne: I believe it was last Friday. I might have to take that on notice to confirm.

CHAIR: With some of these things, could I suggest to you—bearing in mind you are coming back at 12.30 – that you can take it on notice—

Mr Walter: It would have been last week.

Senator PRATT: Last week, and the bill was introduced on Wednesday and considered, which means Senator Brandis would have had to take it to the party room. Did they announce it before they took it to their own party room?

Mr Walter: After.

CHAIR: Senator Pratt, while you are getting your thoughts together, I just indicated to Senator McKim that I think, in fairness to all senators, we will go in 10-minute blocks. We only have an hour. I will finish with you for another couple of minutes and then the government and then I will go back to the Labor Party and then to Senator Hinch or Senator McKim, or both. That what we will do.

Senator PRATT: I might give my couple of minutes to Senator Watt.

CHAIR: We will come back to you.

Senator WATT: Can you describe how deleting the words 'insult', 'offend' and 'humiliate' and including the word 'harass', would change the application of section 18C?

Mr Walter: The best way to characterise what the government is trying to do here is that the words that exist in section 18C have been interpreted by the courts to have what might be characterised as a slightly different meaning to what the ordinary meaning of those words is—that which the normal person would pick up—and the government is trying to more closely align the words on the face with the legislation with the judicial interpretation of those provisions, which has over time resulted in what might be called a higher threshold to get over than the ordinary words of 'insult' and 'offend' and 'humiliate' might ordinarily be taken to—

Senator PRATT: A higher threshold.

Mr Walter: When the court has applied those provisions, it is applied at a higher standard than might be apparent from the ordinary meaning of those words.

Senator WATT: My understanding is that, if it is not the leading comment, interpretation of this is from the now Chief Justice of the High Court who, in an 18C case, said that, effectively, mere slights would not be enough to amount to a breach. It has to have a profound impact. I think that is what she said.

Mr Walter: That is right.

Senator WATT: She has said that mere slights will not be enough to constitute offence, insult or humiliate in this context. Would you agree that moving to 'harass' is a higher bar again?

CHAIR: Again, you asking for Mr Walter's opinion and, as you know, it is inappropriate to put public servants in that position.

Senator PRATT: We are asking for the legal—

CHAIR: Senator Pratt, would you please at least let the chair finish the—

Senator WILLIAMS: Show some manners.

CHAIR: So you are asking public servants for a matter of opinion. It is also getting very close to expressions of views on the law, and again, as you know, it is not appropriate to ask anyone, let alone public servants. I just warn Mr Walter not to give his opinion on things that are beyond his remit.

Senator PRATT: That is what he is here to do.

Mr Walter: Perhaps I can characterise it this way. The intention is to marry up those two things, in essence, to say: 'The court has interpreted these provisions. Make the language on the face of the act reflect the standard that has been applied.'

Senator WATT: So you say that 'harass' is the same as, to paraphrase, 'a profound level of offending, insulting or humiliating'.

Mr Walter: Reading the two together, of course—'harass and intimidate'—not just word by word. If you look in the Macquarie dictionary, for example, the types of words you will see are 'to torment somebody' and 'to disturb someone'—those kinds of standards. So it is trying to marry up this kind of ordinary usage of language with how the courts have applied that.

Senator FAWCETT: Regarding the consideration of how the act itself was to be changed, my understanding is that in 1995 the recommendation was to include the word 'harass'.

Mr Walter: The original inquiry into racial hatred, which was carried out by the then Human Rights and Equal Opportunity Commission, had a recommendation that legislation be enacted using the term 'racial harassment'. So, yes, it does pick up that language that was originally recommended.

Senator FAWCETT: In the consideration, to what extent did you look at the applied outcomes? We have just heard about High Court judgements that talk about more than mere slights, but what we have seen in practice is that in the whole process, when people are subject to complaints, quite often the harm is done to them by way of stress, financial impact and reputational damage, before it even gets to a court, let alone a court judgement. How much was that taken into account?

Mr Walter: I think it is very important to note that the vast majority of complaints under this provision will never go anywhere near a court. They will go through the Human Rights Commission's process. They may be conciliated; they may not. But the vast majority, even if conciliation fails, will never go anywhere near a court because the person will not pursue their complaint even if it is terminated.

Obviously, there are two themes to this bill. One is about 18C itself, but the other is, of course, about the processes, and the intention behind those provisions is to give the commission a greater degree of flexibility in dealing with complaints as it goes along and a wider range of tools to dispose of matters that come before it more effectively and to get rid of those which do not have any clear merit.

Senator FAWCETT: Clearly, the report that was done by the joint committee had recommendations around process. In your drafting of these provisions, did you also engage with the Human Rights Commission to get their input into that?

Mr Walter: We did. We had ongoing engagement at an officer level with the commission and there was also a meeting shortly after the report was handed down between the Attorney, Ms Swinbourne and me, and the president and other staff of the commission to get their views on the report's recommendations—to be very clear, specifically about the complaints process, not about 18C as such.

Senator FAWCETT: Were they supportive of the measures to reform the process?

Mr Walter: I want to be very careful not to in any way verbal the commission or the president about their own views on how we have given effect to it, but they were strongly supportive of reforms to the commission's processes. They too wanted a wider degree of tools to be able to deal with the variety of complaints that come before them.

Senator FAWCETT: Regarding your drafting of the other sections around the reform of 18C, clearly the joint committee took evidence from a wide range of people. Did you look at the range of submissions? There was, for example, Mr Mundine, who has been very supportive, as an Indigenous man, of changes to this area of law. He has pointed out the fact that there have been many cases—I think he specifically cited Bill Leak—where offence was taken because people were looking for offence as opposed to there actually being offence in what was written. Did you look at all those submissions as part of forming your views on this reform?

Mr Walter: Obviously, we appeared before the committee on a number of occasions when it was considering the issue. We were monitoring the submissions that came in. I cannot vouch for everyone here—I certainly did not read each and every one of them—but we were looking through them and seeing what kinds of views were being expressed, and then of course we have gone through the report as well.

Senator PRATT: I want to ask further questions about the EM. It is not usual practice for an EM to be partly written by a minister, is it?

Mr Walter: Yes, it can be. The minister ultimately signs off on the words that are in an explanatory memorandum just as they sign off on the words that are in a piece of legislation. It is not uncommon for an Attorney-General, in my experience, to settle the words in an explanatory memorandum.

Senator PRATT: In the explanatory memorandum, in relation to the Human Rights Commission—I think these are unusual words—it says:

The promotion of 'groupthink' is an undesirable and inappropriate statutory objective.

Did the department drive that particular line?

CHAIR: I am uncomfortable with this. It is almost in the line of advice to the government, and public servants would be put in a difficult position if they answered those sorts of questions.

Senator PRATT: I will put the question again:

The promotion of 'groupthink' is an undesirable and inappropriate statutory objective.

That does not sound, to me, like something the department would write. Did the department write that line?

Mr Walter: I would need to go back to the previous drafts and how they were responded to.

Senator PRATT: Do you think it is it is an unusual kind of statement to have in an EM?

CHAIR: That is, again, a matter of opinion and you should not put the public servants in that position.

Senator PRATT: Well, it is not really. Either it is unusual or is not unusual.

CHAIR: 'Do you think?' is a matter of opinion.

Senator PRATT: Is that an unusual statement for an explanatory memorandum?

CHAIR: That is a matter of opinion.

Mr Walter: That is a very difficult question to answer, because there are a huge variety of ways in which these things are prepared. Even the style can be completely different.

Senator PRATT: We are all used to dealing with parliamentary draftspersons in here. Can you define 'group think' in legal terms for me?

Mr Walter: The government's concern in relation to this particular provision and what these words are trying to express, I think, is that this particular amendment effectively does two things. Firstly, it brings the management of the Human Rights Commission into line with the management of other bodies in the Commonwealth. We did a search through the statutory data base and we could not find any other examples of the type of provision that you find in the Australian Human Rights Commission Act. So it brings it into line with that. It was drafted with cognisance of the PGPA Act requirements as well.

Senator PRATT: In what way has the Human Rights Commission promoted group think?

Mr Walter: Sorry, just to complete that. Secondly, what the government was concerned about there was to say that we have a Human Rights Commission with commissioners, and it is often very significant, high-profile individuals who are pointed to those positions. The government's view is that they should be free to speak about human rights as they see fit, even if they sometimes disagree with one another. There does not have to be one, single monolithic view from the commission, but different commissioners should be able to say, 'On this particular issue, I politely disagree with my fellow commissioners. I think the better view is dot, dot, dot.'

Senator PRATT: Surely that is only going to undermine the overall standards and thresholds they were supposed to uphold? There is no common denominator if everyone is expressing a different view from the standards that are set by the Human Rights Commission.

Mr Walter: Obviously, the position is not a free-for-all. The commission is still expected to behave in a fashion that promotes the general unity of the organisation. However, the government's view is that there are legitimately different views on how certain rights can be given effect to, that the scope of certain rights can also be debated and that there should be room for the commission to have a number of views on that, not just one view.

Senator PRATT: But it sounds to me like that is a recipe for more watering down—not only watering down the threshold in legal terms by virtue of moving from 'offend and insult' to 'harassment' but that promoting more independence amongst the commissioners and acknowledging disagreement between them will ultimately undermine the standards that they are there to set.

CHAIR: I am not sure there is a question there. What is the question?

Senator PRATT: Can you see the point that I am making?

CHAIR: No, but what was the question of the witness?

Senator PRATT: If you have commissioners who are acting substantively in the same area and who express different opinions then ultimately you could water down the standards that are required from the Human Rights Commission in terms of the legal thresholds.

CHAIR: But what is the question?

Senator PRATT: I think that Mr Walter understands the question I am asking.

Mr Walter: If the nub of your concern, Senator, is that if there are different views within the commission about the application of a particular human right then the concern would be that if a complaint is made to the commission about that human right then those disparate views might result in undermining of the complaints process. Is that the concern?

Senator PRATT: Yes.

Mr Walter: Right. So, perhaps the answer to that is that all complaints are handled by the president. So there is only one view in the complaints process that actually matters: that of the president. Or, in the event that the president has delegated a complaint—which they can do but not to commissioners, typically—then that is the view that matters. It is more about—

Senator PRATT: I can accept that. I therefore do not understand why you need this particular statement in the EM. But, anyway, I will pass to Senator Dodson now.

Senator HINCH: Excuse me, Chair, before we do that—just for your advice: I have had a text from Senator Xenophon. He said to let you know that he is listening in. He may have some questions at the end of each slot.

CHAIR: Okay, and thank you for reminding me. Are you with us, Senator Xenophon?

Senator XENOPHON: I sure am!

CHAIR: I am sorry about that. I knew you were coming in on the phone, but—

Senator XENOPHON: No problem.

Senator DODSON: I just want to ask about recommendation 3 of the report, where the last line in the para says:

The range of proposals that had the support of at least one member of the committee included: …

And then if you go to subsection c it says:

c. removing the words 'offend', 'insult' and 'humiliate' from section 18C and replacing them with 'harass'; …

That seems to be the only basis upon which the change has relied.

CHAIR: I am not sure that—

Senator DODSON: Well, but that is what it says.

CHAIR: Yes, but what is the question to Mr Walter?

Senator DODSON: The question is that the support to amend 18C to include the word 'harass' is only reliant upon this particular recommendation, where there appears to be only one person on the committee who has given it any support.

CHAIR: But these are not questions of public servants; these are questions for the government. It is quite obvious that this is government legislation. Governments are elected to govern and the government has decided to do this. It has asked the public service to draft accordingly.

Senator WATT: Putting it another way: it sounds from your earlier evidence that normally in this case the decision to go with this option about harass was a government decision. Were you ever advised why this particular recommendation was the one to go with rather than any other recommendation within the report that also had the support of at least one committee member?

Mr Walter: I do not think it is quite that clear cut, but I think that the history of the consideration of this provision includes other options that were considered previously by the government in terms of amendments to 18C, which of course did not go forward in the end. They were withdrawn. So there has been previous consideration of the issue. You also had a range of views canvassed during the committee hearings which the government was aware of. You then had the committee's report which refers to the term 'harass'. You had the original inquiry report that lead to the racial hatred act which had also initially considered the term 'harassment'. The term 'harassment' is also used in the Disability Discrimination Act. It is of course in the Sex Discrimination Act, as well, but there is a specific definition there. So we do not want to get confused by that, but I do note that it is there, as well. So the term 'harassment' is also used in the common law. There are a range of things that you can point to in terms of the term 'harass', not just this one line.

Senator DASTYARI: Following that—I have one very quick question. When were you asked to actually start preparing the explanatory memorandum?

CHAIR: That has already been asked.

Unidentified speaker: The 2nd?

Senator DASTYARI: Has it? The 2nd?

Mr Walter: We were asked to start preparing legislation on the 2nd. You just prepare an explanatory memorandum as a matter of course whenever you do a piece of legislation.

Senator DASTYARI: I was not aware that had already been answered. Thank you.

Senator DODSON: Can I have a final question, Chair?

CHAIR: Your last question, Senator Dodson.

Senator DODSON: Thank you, Chair. Just in relation to, again, recommendation 3, subsection (e). I think that is reflected across in the proposed amendment after 18C subsection (2) and 2(a), where the standard of a reasonable member of the Australian community is inserted. What is the thinking behind changing that and the potential consequences for a court to consider—from an objective test to now a pretty subjective kind of view of what somebody is going to be determined as a reasonable member of the Australian community?

Mr Walter: The test that is currently applied by the courts is to have regard to what a reasonable member of the group from which the individual or the group of people who are the complainants come from. So if the complaint is on the basis of somebody's Jewish origin when the court applies its test the reasonable member of the Jewish community is the test that is currently applied. What this does is it says, instead of the reasonable person from the Jewish community in that instance, you would apply the reasonable person from the Australian community writ large. The idea behind that is to say that, in essence, people should be able to conduct themselves in a reasonable and civil fashion having regard to the normal standards of behaviour in Australia, reflected in general community values, whilst being sensitive to other people and being aware of areas where they might have particular concerns or vulnerabilities without actually having to be constantly thinking about, 'What is the vulnerabilities, susceptibility, proclivity of the person in front of me?' So it is judging against just a slightly different standard. In practice, it is probably not a huge difference. However, it is about drawing those values from the broader community rather than from a segment of the community which is what the law currently does through judicial interpretation

CHAIR: Thanks, Mr Walter. We have got some helpful explanations. We have 15 minutes left. I have three senators who want to say something, so we might look at about six minutes for each.

Senator McKIM: I would object to that. I just want to express my extreme frustration at the fact that the Greens are going to be limited to six minutes thanks to the government, thanks to the Nick Xenophon team, and thanks to Pauline Hanson's One Nation for voting for a microinquiry into such an impactful piece of legislation.

CHAIR: Do you have a question, Senator McKim? To respond to that, the Labor Party has had about 20 minutes of this hour; the government has had about three minutes of this hour and the program has been set for an hour for the Attorney-General.

Senator HINCH: I will have two minutes, thank you.

CHAIR: I am extending that a little up to six minutes and, Senator McKim, you have already done a minute of yours.

Senator McKIM: Mr Walter, does the department accept that if these amendments go on to become law that words that would currently offend section 18C would no longer offend 18C?

Mr Walter: I do not think it is that simple. I think that, as with the current provision, which refers to acts—which can include words, of course—context is very important. So something that is said in one context may not offend 18C right now, but if it were said in a particular fashion, if it were repeated, if it were done in a particular place or context it might fall foul of 18C. I think that, as I said earlier, the legislation is attempting to marry up more closely the judicial interpretation of 18C as it currently stands—

Senator McKIM: Which is a higher bar than the ordinary meaning of the words in the act, is it not?

Mr Walter: That is right with the ordinary meaning of the act, so that the regular person, for want of a better term, can look at the provision and have some sense of what its behaviour is. In all circumstances you have to have regard to the context in which the act occurs.

Senator McKIM: Of course that is true, but you have just agreed that the judicial interpretation is a higher bar than the ordinary interpretation of the act so, therefore, would you not agree that these amendments raise the bar?

Mr Walter: I do not think you can say that. If the legal meaning, as interpreted by the courts, is one thing, as it is now—

Senator McKIM: A higher bar, as you have agreed.

Mr Walter: It is a different standard from what you might ordinarily expect those words to mean on a piece of paper.

Senator McKIM: You did agree that it was a higher bar.

CHAIR: Senator McKim, you asked the question. It is courteous and useful if the witness can finish their answer before you cut in again.

Mr Walter: There is a different standard. I think if you read the words you would expect it to be one standard. The courts are consistently interpreting terms of a different standard. You can say it is higher; you can say it is more specific; you can use all sorts of language to describe that, but the courts have consistently applied a different meaning from what you might imagine the ordinary meaning of those words would be. This act has the effect of reflecting the fact that that has been the standard.

Senator McKIM: Mr Walter, you agreed with me earlier that the way that the courts have interpreted the current provisions of 18C is a higher bar than the ordinary English meaning of those words.

Mr Walter: I think that is perfectly reasonable.

Senator McKIM: Thank you. So doesn't it follow logically that if the intent here is to, if you like, codify the court's current interpretation in the legislation, that this legislation is raising the bar?

Mr Walter: No, I do not think it can follow that. It is a law. The legal meaning is what the courts have said it is, and that means that the threshold is the threshold set by the courts. It is not the threshold set by you or I deciding what 'insult' means. It is a piece of law, and the law is set by the courts. I do not think you can characterise it that way.

Senator McKIM: Could you just run us through the nature of the consultation with the Human Rights Commission on this specific piece of legislation.

Mr Walter: Again, I can only talk to what the department was involved in in terms of consultation. We had some initial consultations at a departmental level once the report had been handed down. There was a meeting, which I have already referred to, involving the Attorney-General, Ms Swinbourne, the president and other members of the Human Rights Commission where we discussed the report's recommendations—but again, to be clear, the amendments to 18C were not discussed at that meeting; it was about the commission's processes. We have had ongoing consultations at officer level about particular elements—again, not so much about the 18C stuff, but more about the complaints handling processes about how they might work for the commission. Some of the aspects of this bill reflect specific requests from the Human Rights Commission so we have letters from the president asking for those changes.

Senator McKIM: Mr Walter, just to try to narrow that down because we are very short of time. The question was specifically on this bill, so it is not about the historic nature of your interactions with the commission. I will try to narrow it down. When did the commission see this bill, exactly which date, and were they given an opportunity to feed back specifically on the provisions of this bill?

Mr Walter: We think it was on the 21st that they saw the words of the bill. However there were discussions about the content of the bill as we went through the drafting process.

Senator McKIM: Okay. So, the commission saw a draft of the bill on 21 February?

Mr Walter: Sorry, 21 March.

Senator McKIM: March, all right.

Mr Walter: The report happened.

Senator McKIM: I understand they were on the Human Rights Committee.

CHAIR: You are aware Professor Triggs is giving evidence and you can ask these questions then.

Senator McKIM: So, 21 March. Did they respond in writing to the department or in any way to the department?

Ms Swinbourne: No.

Senator McKIM: This bill was tabled with no feedback from the Human Rights Commission. I think that is the evidence you have just given.

Mr Walter: Sorry, Senator.

Senator McKIM: Is that correct?

Mr Walter: Senator, can I just go back to my earlier answer. I can only talk about what consultation occurred between the department and the Human Rights Commission.

Senator McKIM: That is not what I am asking.

Mr Walter: There may be another consultation which you can ask the Human Rights Commission about.

Senator McKIM: Yes, I will be asking the Human Rights Commission.

Mr Walter: To get the full picture you need to talk to the Attorney and—

Senator McKIM: Yes, I know how this stuff works. Just to be clear the department did not receive any feedback from the Human Rights Commission to the draft bill that you provided on the 21st?

Ms Swinbourne: No, Senator, that is because the bill was the subject of the cabinet process.

Senator McKIM: Okay. Are you aware of whether the Human Rights Commission fed into the Attorney-General's Office on this bill?

Mr Walter: I think you would have to ask the Human Rights Commission.

Senator McKIM: Mr Walter, if you are not aware then you are not aware.

Mr Walter: It is a question for the Human Rights Commission.

Senator McKIM: I am asking about the department's awareness of whether or not. I am not asking whether or not it happened, just to be clear. I am asking you: is the department aware of any interactions between the Attorney-General—

Mr Walter: We understand there may have been and, again, that is better directed to them.

Senator McKIM: Okay. To go to some of the specific matters—and I am talking here about the proposed reforms to the Human Rights Commission Act—

CHAIR: Is this your last question?

Senator McKIM: It may or may not, depending on the committee's decision, Chair. I wanted to ask you, Mr Walter, do you accept the written view of the Human Rights Commission provided to this committee that the mandatory accept-reject phase that these amendments seek to insert risk causing additional delay and added costs for parties? That is based on evidence given to the Human Rights Committee by the Tasmanian Anti-Discrimination Commissioner, Robin Banks. I think she is now just the former Tasmanian Anti-Discrimination Commissioner. Do you accept that these provisions risk causing additional delay and added costs and isn't that an unintended consequence?

Mr Walter: We understand the commission has made a submission to the committee but we have not seen that as yet. I have not read it and I cannot put that in context.

Senator McKIM: I am not asking about the submission, I am asking about the issue.

Mr Walter: Yes, I will respond to the issue. I would have to understand, more closely, exactly why they think that might be the case. The only thing I can imagine they might be concerned about is the possibility of judicial review in relation to that provision. In practice I am not sure that that is going to play out in a very big way, if that is the concern. Yes, there would be the possibility of judicial review but, of course, if the matter is terminated under those provisions the complainant already has kind of two sets of options. One is to pursue the judicial review angle. They might have 28 days under the AD(JR) Act, for example, to seek judicial review of the president's decision to terminate. But of course termination also triggers the right, for want of a better term—which will now be subject to a bar, that you will need to seek leave—of going to the court to have your 18C matter resolved by the court. So I am not sure whether, in practice, this would be a significant cause of delays.

Senator McKIM: Even though the—

CHAIR: Thank you, Senator McKim. Senator Hinch?

Senator HINCH: Thank you, Chair.

Senator McKIM: [inaudible]

CHAIR: You were warned that the last question would be your last one. You have had 10 minutes, which is more than twice the time the government has had, so keep your foolishness to yourself. Senator Hinch.

Senator McKIM: Well, that says more about you than it does about me, Chair.

Senator WILLIAMS: Knock it off, and get on with the job.

Senator HINCH: Mr Walter, you said that the law is set by the courts to decide what 'insult' means—not by you, not by me—and that is indicative of the fact that words like 'insult' and 'offend' are such subjective words. In the planning of this legislation, was that the deliberate reason behind replacing 'insult' and 'offend' with a word like 'harass'? Because 'harass', as you also said, is a more specific word, it is a harder word than 'insult' or 'offend', and it also means 'torment'. Was that the background of the drafting of this law?

Mr Walter: Again, there was the past consideration of amending the act. A different word was used the last time. 'Vilify' was the word that was considered at that time, through the PJCHR process, as you know. The term 'harass' was one option—I am not suggesting it was the only option—that was raised to deal with that. It has some history in the human rights space in the fact that it is in the Disability Discrimination Act. It obviously was in the original report that led to these provisions. So there is quite a degree of history in terms of the choice of that phrase.

Senator HINCH: It was considered and rejected in the early legislation, wasn't it?

Mr Walter: That is right. And, to be honest, I do not know what the reasoning was then. We tried to find out, but our records are a little thin.

Senator HINCH: Sure. Thank you.

CHAIR: Senator Xenophon.

Senator XENOPHON: I have just a couple of quick questions. The Human Rights Commission, in their submission to this inquiry, has recommended that item 31—that is, changes to section 46PF(1)—not be proceeded with in its current form. That relates to the mandatory accept/reject stage of the complaints process. Could you clarify, Mr Walter, whether it is your view that, if there were a rejection of a claim using the proposed section 46PF(1), that would itself give rise to a judicial review right; and I take it that that right would not require any consideration by the commission as to whether it proceeded, because it would be an independent right of judicial review? I hope I have made that clear.

Mr Walter: Yes. As I was saying to Senator McKim, who I think had a similar question, in the event that the president chose at this stage of proceedings to terminate the complaint, there would essentially be two courses of action open to a complainant. The first would be, yes, to seek judicial review of the decision to terminate, and that might be exercised in certain contexts. The other thing, though, that is very important is that, just as in the current legislation, a decision to terminate the complaint triggers the application to the court process, which is not a judicial review. It is, for want of a better term, a de novo consideration of the actual complaint. The fact that it has been terminated gives you that option to go to the court. Now, the proviso that I put on that is to say that this bill also introduces a leave requirement so that the court would have to consider whether they wanted to hear the matter—and, of course, if it is something that is completely lacking in substance, you could expect that it would be rejected. However, you would probably have the same problem if you went down the judicial review path.

Senator XENOPHON: Just to clarify, does that mean that if the commission terminates a complaint at an early stage, saying for whatever reason that it lacks merit, the person can then make a de novo application to the court? And would that de novo application then be subject to an accept/reject process, if you like, by the court or by the commission?

Mr Walter: Once it has been rejected by the commission, the complainant can then make an application to the court, but the court goes through a leave process, which is not uncommon in court proceedings. In that context, they would of course consider whether the matter has any merit or substance and is worth going on to a court hearing. But, subject to that bar, you can go off to the court, and that is a de novo hearing at that point.

Senator XENOPHON: I have two final quick questions on that. Does that mean that costs would follow the event if you were not successful in getting leave? Does the person bear their own costs? Would it be an ex parte application, in a sense? Would the person complained against have a right to go to the court in respect of that leave application to say, 'We don't think leave should be granted, for these reasons'? Or does the court just look at it on the basis of the complainant's application only?

Mr Walter: The normal process would be that somebody who was opposed to the complaint going to the court would be able to contest the leave application and say the matter does not have merit or whatever. The normal course would be costs would follow the event.

Senator XENOPHON: This is my final question. The joint standing committee considered refundable application fees and almost a discretion in respect of costs. There would be a constitutional issue with respect to that, wouldn't there?

Mr Walter: The government were not as concerned about any constitutional issues in the fee application process. They were concerned about two things. One was an access to justice issue. Obviously the commission is intended to be a low-cost avenue to have your discrimination complaint considered without going through the costly process of going to court. So the government was concerned about imposing fees.

The other aspect was the workability of such a proposal. I think the first argument was the stronger one, but the workability, particularly the refundability in the context of conciliation, was hard to match up. What is a successful conciliation and what is a failed conciliation? When do you get a refund and when don't you? Is the commission going to be put in the invidious position of having to judge the complainant's behaviour? It is that kind of thing. So there were two aspects. One was access to justice, to make sure the commission remained accessible to the most vulnerable people; the second was the workability of the proposal.

Senator WATT: As best we can make out, it seems that the government is relying very heavily on two legal cases to justify these changes. One is the case involving the QUT students and the other is the Bill Leak case. Of course, both those cases were matters brought under 18C which failed. They were either lost in court or lost in the commission's preliminary processes. It strikes me as a little bit strange, then, that we need to make a change to the law to deal with cases that failed. Are you or is anyone else in the department currently preparing any other amendments to legislation to deal with cases that have failed?

CHAIR: Answer that as you will.

Mr Walter: That is an enormously broad question. Firstly, I do not entirely accept the premise of your question. While those two cases are the more recent cases and obviously there has been a high degree of media attention on them, I think it is fair to say the government has been concerned about or has had an interest in 18C for quite some time. Of course, there was a previous attempt by the government to bring forward legislation in relation to 18C which predated both QUT and the complaint made against Mr Leak, which was withdrawn, as I understand it. So I would not quite accept that characterisation.

The broader point would be simply to say that we of course look at any significant judicial consideration of the legislation that we administer. My area of the department is responsible for about 43 pieces of legislation, from memory—not just human rights. I look after other areas as well. Sometimes there will be judicial consideration of cases that throw up issues and vulnerabilities in a piece of legislation, even if the case failed, as you characterise it. A judicial consideration of a provision may nonetheless throw up an interpretation or show a vulnerability in the legislation that we might turn our minds to. So it is not out of the question.

Senator WATT: I am just thinking about another piece of Commonwealth legislation—insolvency law. If a liquidator or someone brings an action under insolvency law and it is deemed to be unmeritorious and thrown out by a court, wouldn't you say that this suggests that the law as it stands is working? Similarly, in this case, the fact that certain cases were deemed to be lacking merit and were thrown out suggests that the law is working?

Mr Walter: You might say that is an easy conclusion to reach, but in the task of 'throwing the case out', to use your phrase, it might be that the judge reflects on the operation of the particular provisions, and we might reach a view that that interpretation is not the correct one—that, even though the case was thrown out, in fact the law was misinterpreted. In those circumstances, we might have concern that, if the language is picked up by future cases, we might have a problem on our hands. We are obviously talking in great generalities here, but we may from time to time have regard to those kinds of decisions, if we think they show a vulnerability or that the courts are interpreting a provision in a way that in our view—or the government's view, ultimately—the legislation is not meant to be interpreted.

Ms Swinbourne: I would just add that there are also examples of criminal provisions where the CDPP, for example, comes back to government and says: 'We are not able to sufficiently capture the intent behind this criminal offence. Can you please change it?' There have been examples of that.

Senator DODSON: Can you explain to me proposed paragraph 36(7) of the amendment? It reads:

(7) The President must notify the complaint to the respondent, unless the President is satisfied that notification would be likely to prejudice the safety of a person.

How is the president going to make their mind up as to the safety of a person in relation to notification?

Mr Walter: The concern here is the context in which a complaint has been made. A complaint might be made about a course of conduct that might, for example, include threats of violence or physical harm against the person. It might involve stalking or those kinds of activities, in which case the legislation needs to provide the President a discretion to say: 'You know what? In these circumstances I don't feel comfortable and I don't think it is right for me to notify the respondent that a complaint has been made against them.' So it is to give that flexibility.

Senator DODSON: I understand that. I am concerned that if the president makes the wrong call, without having a crystal ball showing how someone is going to behave, there could be some injury caused or violence perpetrated on the complainant.

Mr Walter: Absolutely it is a problem we have in the law now, and it is a problem we have in many, many laws. We start from a proposition under our law, as you know, that somebody who has had a complaint made against them or is accused of something has the right of response.

Senator DODSON: I understand that. Is there any indemnity for the president in relation to this kind of decision? I can see the president potentially being exposed here. I can understand what it is trying to do, but someone is going to sue the president if they make the wrong call.

Mr Walter: Just as I am, the president is subject to the normal insurance regimes that exist under Commonwealth law. If an action is brought against them in relation to their exercising Commonwealth duties then they are indemnified to that degree. In that sense, they are protected.

Ms Cameron: There is a provision in the act which protects any member of the commission from any suit which is brought because of an act of the commissioner under the act where the act is done in good faith.

CHAIR: What provision?

Ms Cameron: Section 48 of the act.

Senator DODSON: But is that good faith if there is now an onus? If it is compulsory for them to report unless in their judgement they decide there is no injury likely to be caused that is not good faith. That is an onus.

Mr Walter: The exercise there is, 'Did the president in making that decision come to that decision in good faith?' Did they say, 'I don't care whether that person is safe or not'? Or did they say, 'I know that person and they are just making this all up.' Or did they turn their mind to the situation and, if anything was triggered, make appropriate inquiries and then made a decision? You do not get indemnified for corrupt acts or acts done in your own personal interest and those kinds of things, but otherwise you are protected.

CHAIR: Are there any other questions? Senator McKim was carrying on but does not seem to be in the room.

Senator PRATT: We have actually got many, many questions but because of the short time of consultation for this is I do not think we have time to ask them. What this bill really needs is a public consultation, but we do not have time for that.

Ms Swinbourne: You asked earlier on about previous changes to the Racial Discrimination Act. We just checked and 1995 was the most recent. You also asked when the explanatory memorandum was given, and that was on 20 March.

CHAIR: As there are no other questions, I thank officers of the department for their attendance.

WALTERS, Ms Adrianne, Director, Legal Advocacy, Human Rights Law Centre

[10:16]

Evidence taken via teleconference—

CHAIR: Welcome. Would you like to make an opening statement or comments? Then the committee will ask some questions.

Ms Walters: Yes, I would like to make a short opening statement. I would like to thank you for inviting me to appear before the committee, even at such short notice. First of all, no person in Australia should have to live in fear of being vilified because of their race, ethnicity or national origin. At its heart, this is what 18C aims to prevent and, in doing so, has an important role to play in strengthening social cohesion and inclusivity in Australia.

Section 18C renders unlawful conduct that is done in public and is based on race, ethnicity or national origin and that has serious, profound and public effect. Whether conduct meets this test is assessed against an objective standard: a reasonable or ordinary member of the relevant racial or ethnic group. 18C does not prohibit comments in private or comments that only cause hurt feelings.

Section 18D, which must be read with 18C, contains broad freedom-of-speech exceptions. People can say things in public about race for a range of reasons such as artistic expression, and those things can cause offence, humiliation and intimidation and they can even have serious and profound effects as long as they are done in good faith and reasonably.

Together, section 18C and 18D strike the right balance between two fundamental rights: freedom of speech and freedom from racial discrimination and prejudice. As the Parliamentary Joint Committee on Human Rights noted in its report recently, the laws are consistent with Australia's human rights obligations.

The proposal in the human rights legislation amendment bill in relation to section 18C will water down the current level of protections afforded to racial and ethnic minorities in Australia. First, replacing 'offend, insult and humiliate' with 'harass' is likely to weaken the legal protection against racial vilification. How this new wording would be interpreted by the courts is hard to predict, but the broader social impact is very concerning. It communicates to racial and ethnic minorities that freedom from racial prejudice is of lesser priority to the government than the ability of others to say racially offensive, insulting and humiliating things. It communicates to those who would say racially offensive, insulting and humiliating things that the government thinks they should be allowed to. This is a dangerous message to send at a particularly dangerous time, with reports of racism on the rise.

Secondly, replacing the current objective test in which the impact of conduct is assessed against a reasonable or ordinary member of the relevant racial or ethnic group with a reasonable member of the Australian society will also weaken the law. Assessing conduct against the objective standard of a reasonable person from the relevant group ensures that the specific experiences, values and circumstances of different minority groups, or those most at risk of racial vilification, are considered in assessing the impact. It means, for example, taking into account the context of the Holocaust and Jewish people's experiences of violent anti-Semitism. When considering whether anti-Semitic conduct is reasonably likely to have serious and profound effects, court decisions have even warned that to import a general community standard test runs the risk of reinforcing the prevailing level of prejudice in society.

To change the current objective test to a reasonable member of the Australian community carries these risks, particularly where the conduct affects unpopular racial minorities. Making this change would be inconsistent with the aims of the Racial Discrimination Act and the racial vilification provisions. It is racial and ethnic minority groups that suffer the impacts of racism, not the Australian community as a whole. We cannot and should not expect a reasonable member of the Australian community who has never had the distressing and degrading experience of being called a coon, a black cunt, or a terrorist, or being told that 'Hitler should have finished you' to understand the impact of such statements, and the fear and the sense of exclusion they create.

The Australian Human Rights Commission plays a vital role in educating the public and helping vulnerable Australians address discrimination quickly and at minimum cost. Some of the proposals in the bill appear sensible, but there are a few changes in particular that cause concern to us in terms of access to justice, particularly because they will apply to all discrimination claims, including sex, age and disability discrimination claims. First, changing the time limit for making complaints from 12 to six months will impact most profoundly on those who require assistance or support in understanding their legal rights and then exercising them, such as people with disabilities. There is no clear rationale for this change.

Secondly, requiring nearly all discrimination complainants whose matters are not resolved at the commission to seek leave of the court before being allowed to start court proceedings will mean less incentive for respondents to engage genuinely and fairly in the commission's mediation process. Some cases do not settle because of the conduct of the respondent, not because they are unmeritorious complaints. The courts are already too daunting and out of reach for many vulnerable Australians, and unscrupulous respondents may exploit this and not play fairly at conciliation, knowing that they will not be challenged in court.

Sections 18C and 18D have been working effectively for two decades. The interpretation of the law is largely settled. These changes proposed in the bill are unnecessary, and they send a dangerous message. The recent inquiry by the Parliamentary Joint Committee on Human Rights did not say that the law required change. In fact one of the suggestions was to leave sections 18C and 18D as they are. Some leadership is what is needed at the moment, and a commitment to partnering with Indigenous and multicultural communities in fighting the racism that is uniquely directed towards them.

More broadly—and this is my last point—the concern about freedom of speech not being properly protected in Australia could be more appropriately and comprehensively addressed by enacting a federal human rights act rather than taking the regressive step of weakening important racial vilification protections that promote greater inequality in public debate.

CHAIR: Thanks very much, Ms Walters.

Senator PRATT: Thank you for putting such comprehensive remarks together, given the short notice that you had for this appearance. You stepped through and touched on the manner in which changing 'offend, insult and humiliate' to 'harass' changes the threshold. Could you give us a little bit more detail about your concerns there.

Ms Walters: It is hard to say how the courts will interpret the law. We have not had much time to conduct research around this, but our view is that the changes, when looked at in the context of the debate around 18C—you cannot divorce the comments about the bar being too low and threats to freedom of speech from the proposals in the bill. The language certainly sets a higher bar, and we think that it is likely that the courts will interpret the law to impose a higher threshold. But it is really hard to say, because we do not know how the courts will interpret them. So I guess, also, the changes create legal uncertainty.

Senator PRATT: Will that legal uncertainty dissuade victims of racial hate speech from coming forward, do you think? Also, how do you think these laws interplay with state laws, given that state laws often have quite established racial vilification laws? You would think that in most instances people will access those laws first, and, therefore, it is quite right that the Commonwealth should have a bar that picks up those issues of more general debate.

Ms Walters: I think the debate that has accompanied the consideration of whether 18C needs to change has been having a negative impact on Aboriginal and Torres Strait Islander communities and multicultural communities. I think the current divisive and polarised discussions about racial vilification could already be dissuading victims of racial vilification from coming forward. I have not had much time to really look in detail at state and territory provisions and compare them to what has been proposed. I have not had any time to do that, so that is a question that I might need to take on notice. But, generally, those laws—certainly in Victoria—set quite a high bar, and what that means is that they are not utilised as much as they could be.

Senator PRATT: Yes that make sense to me. In a sense, there are two points. The multicultural communities and Indigenous communities are already getting the message that the standards around racial hatred and vilification are changing, and, whereas previously they had been able to rely on a community consensus that rejects offending, insulting remarks and behaviour directed towards them or even broader statements directed to the general community, that change is already happening. Is that your contention?

Ms Walters: Are you talking about objective test?

Senator PRATT: The objective test, in terms of the standard that communities have come to accept from the law. Clearly that test within the law still it exists up until this point—and let's hope we can protect it in parliament next week. But that standard within the law is also, as you have rightly pointed out, connected to the kind of public debate we are now having.

Ms Walters: I think that is right. I think measuring the impact of racially offensive, humiliating, intimidating comments needs to be done against a reasonable member of the relevant racial group so that we can take into account the specific experiences and circumstances of these groups, knowing that it is those groups that experience racism; it is not the Australian community as a whole who do. We cannot expect a reasonable person in the Australian community to understand the true impact of racially abusive comments or racial discrimination. The current law has been interpreted like this for a quite a period of time—I think for the last 10 or 15 years—and

I really cannot understand why we would change it now, when there is no clear case to change the law and when the Joint Parliamentary Committee on Human Rights itself did not specifically recommend that the law should be changed. One of the recommendations was to leave the law alone. It made more forceful recommendations about the importance of political leadership in calling out racism, investing in public education and ensuring that the Australian community is hearing accurate information about what section 18C and 18D protect and what they allow people to do.

CHAIR: I have just one question, but can I get an indication from Senator McKim, Senator Hinch and other senators as to whether you have questions?

Senator McKIM: Yes.

CHAIR: You don't, Senator Hinch?

Senator HINCH: No.

CHAIR: Senator Xenophon, I am not calling you but just asking you whether you have some questions?

Senator XENOPHON: Yes, I do.

CHAIR: Okay. I will come back to you shortly. Ms Walters, is there anything in the process part of the bill, the part dealing with how the commission should operate, that you think is an improvement?

Ms Walters: In the time in which I have had to look at it, I have not been able to look at it in a huge amount of detail, but I am aware that the Australian Human Rights Commission supports a number of the proposals. I think, as the institution that processes complaints, it is best placed to determined what are appropriate changes to the process.

There are two processes that cause us most concern. One is the timeliness. As I said in my opening statement, the impact of shortening the time limit from 12 to six months will have the most profound impact on the most vulnerable people. It is going to apply to people who experience discrimination on the basis of disability, sex and age. It will apply to sexual harassment claims. There are many reasons why people are not able to lodge a complaint within six months. In the past, I have worked in the community legal sector, with lots of vulnerable people, and I know that six-month time limits are too tight and that they have the effect of excluding some of our most vulnerable people. A reason might include that a person has a cognitive impairment and has trouble accessing a person who can explain their rights to them. It might be that the trauma related to the harassment or the discrimination stops them from seeking help at an early stage. It might relate to a person who has low literacy or does not speak English as a first language. I also note that the Parliamentary Joint Committee on Human Rights did not recommend the time limits for making a complaint be shortened. I just do not know what the rationale is for shortening it. I think that is unacceptable.

Our other concern relates to people who are unsuccessful with the commission's conciliation process applying to the courts. My understanding of the bill is that most will have to seek leave to appear, except where the president determines that it is a matter of public importance. Complaints may not resolve through the commission's conciliation process for a number of reasons. One of those can be that the respondent effectively stonewalls the conciliation process or does not engage in it in a meaningful way, knowing that court proceedings are likely to be too daunting for a complainant, particularly one who is in a highly distressed state or is suffering from other vulnerabilities. This amendment makes the court process an even more daunting one and an even harder one to reach. Our concerns in that respect would be somewhat addressed if section 46PH(1)(i) were excluded from the requirement to seek leave, just like subsection (1)(h) has already been.

CHAIR: Thank you. Just refresh my memory: is there any provision in the act for the president of the commission to extend the six-month period in certain circumstances?

Ms Walters: I am not sure off the top of my head, and I would not want to mislead the committee.

CHAIR: That is fine. I will ask the department later on.

Senator McKIM: Thank you, Ms Walters, for your very instructive opening statement. I accept the difficulty that you mention in trying to predict how courts will interpret laws. I wanted to ask you if you would not mind answering this question: taking the proposed changes to section 18C as a whole, do you think it likely that racism which would currently offend the Racial Discrimination Act, and specifically section 18C, will no longer offend that section if the laws pass as they are drafted?

Ms Walters: I think there is absolutely that risk. As I said, the change in the wording appears to be raising the bar, and then, if we are going to assess the impact of racially offensive, humiliating conduct against the reasonable member of the Australian community, we are not going to be looking at how racism acutely affects particular minority groups. I think there is a real risk that it will allow prevailing levels of prejudice, particularly

against unpopular minorities, to remain or to potentially rise. I think more broadly it sends a dangerous authorising message that to say a racially offensive, insulting and humiliating thing is acceptable to the government. I think at the moment we need strong political leadership supporting important racial vilification protections and communicating to the community that racism is never acceptable and that we need to combat it at every turn.

Senator McKIM: Thank you. I could not agree more. We have just heard from the Attorney-General's Department. Their evidence to this committee was that the changes to 18C were simply a codification of the way that the courts currently interpret section 18 of the Racial Discrimination Act. Do you agree or disagree with that?

Ms Walters: I disagree with that. In terms of how the laws have been interpreted, the courts have said that the effects of the conduct must be serious and profound and that we are to measure the impact against an objective standard, and that objective standard is a reasonable member of the relevant racial or ethnic group. Very sensitive or intolerant reactions are not taken into account by the court. It is a reasonable, ordinary member of the affected racial or ethnic group. I think, quite plainly, the proposal to change the objective test to a 'reasonable member of the Australian community' completely changes that objective test. I have already spoken about our really deep concerns about that change. I do not think you can say it all that that is a codification of the law. In terms of the conduct having serious and profound effects, the courts have not said that the effects must be akin to harassment, so I do not think we can say it is a simple codification. To my mind, a codification would be to say that the impact must have serious and profound effects, not to replace the substantive wording of the provision in the way that has been done.

Senator McKIM: Thank you; that is very helpful as well. Finally, from my part to you—just to be clear that it is the view of the Human Rights Law Centre that, if these changes were passed by the Commonwealth parliament, racism that currently offends 18C would not offend section 18 of the RDA if the changes passed, and that parliament making this change would send a very dangerous message out into the broader Australian community that racism would be then more permissible that it is now?

Ms Walters: I think that is definitely a risk. The only thing I would say is that, obviously, we cannot predict how the courts would interpret words in an act; they engage in a process of statutory interpretation. But I think there are, definitely, both of those risks that you outlined.

Senator XENOPHON: Thank you very much your submission and evidence. Going to the issue of the 12 months to six months—do you see circumstances, whether it is a 12 month or six month time limit, to have an ability to extend time in exceptional circumstances? For instance, if someone has been working in an environment and did not want to make a complaint while they were still being employed, do you see circumstances a bit like the extension of time provisions in a number of statutes around the country?

Ms Walters: Yes, absolutely; I am not sure at the moment whether there is provision in the Australian Human Rights Commission Act for an extension of time, but if there is not one, then I think that is vitally important. But I do not think that will remedy the issue of bringing the time limit forward a whole six months, for the reasons I have already outlined.

Senator XENOPHON: That is fine. The other issue is about the seeking leave, and you say that may discourage some respondents from genuinely conciliating. I suppose one argument is that it cuts both ways. What do you say is an appropriate way of dealing with those complaints that are frivolous or vexatious, where a complaint is brought where, on the face of it, there appears to be a very clear defence under 18D?

Ms Walters: At the moment, the commission can already terminate complaints where they are frivolous or vexatious. From my brief reading of the other proposals to amend the Australian Human Rights Commission Act, the President will be able to terminate where she thinks an inquiry is not warranted or there are not reasonable prospects of success. So I actually think there is ample opportunity for complaints to be terminated on those grounds. Section 46PH(1)(i) relates to the president terminating a complaint because there is no reasonable prospect of the matter being settled at conciliation. That is not a question of whether there a prospects of success in court; that is a question of the behaviour, the conduct and the willingness of the parties.

Quite often in discrimination complaints there is quite a large power imbalance. A lot of complaints are made against employers, especially in the context of sex discrimination and sexual harassment. It is the employer that typically has the upper hand over an employee. They are in a position to not necessarily engage in the process in a completely meaningful way, because they know that the victim is unlikely to be able to afford the cost risk, the time and the stress of court proceedings. People do not start court proceedings lightly, especially when they get legal advice.

Senator XENOPHON: I suppose the flipside is that in the context of a frivolous or vexatious complaint it can cut both ways. I understand what you mean about disparity of power. I will go to the vexed issue of the QUT case, and that is used as an example for reform of the process. That was effectively dismissed when it was dealt with by the court. What do you say about a case like that, that many would say should never have got as far as it did?

Ms Walters: My understanding is that case is a bit of an outlier. It is a really unfortunate one. It is unfortunate that it has dragged out this long. But changing laws so comprehensively, and in particular changing the substance of 18C, because of that case is a completely inappropriate response. I think with all laws, whenever there is a cause of action, whether it is a complaint process or commencing court proceedings, there is always going to be a risk of unmeritorious complaints. We cannot change the substance of a law in a way necessarily that would rule out the risk of unmeritorious complaints. I am not commenting on whether the QUT case was unmeritorious. I think you can change processes. To recommend the proposals in the bill to change the commission's processes would capture what happened in the QUT case, and—

Senator XENOPHON: You are saying the QUT case probably would not have gone as far as it did, or it would have been terminated early on, with the proposed changes?

Ms Walters: It sounds like it. It is hard with the QUT case, because there is a lot of detail that we just do not know. I am confident that the recommendations that the Australian Human Rights Commission made and have reported as part of the joint parliamentary committee on the Human Rights Commission's process, would address those issues.

Senator XENOPHON: People have been talking about the late Bill Leak and that cartoon that was subject to a complaint. My reading of 18D is that there was an utterly obvious defence to that. What do you say about a case like that? Do you believe that these processes would lead to a matter like that being dealt with by virtue of the 18D defence?

Ms Walters: Again, I do not know the details of what happened when the Bill Leak complaint got to the commission. My understanding is that it potentially had an opportunity to have the matter finalised quickly. The complaints were terminated and withdrawn fairly quickly in any event. But, from looking at the proposals in the bill and the fact that 18D would be specifically referred to in a note in the Australian Human Rights Commission Act in terms of dealing with complaints received, I think that would address that concern.

Senator XENOPHON: Thank you.

CHAIR: Thanks, Senator Xenophon. Senator Fawcett has just two minutes for questions.

Senator FAWCETT: Ms Walters, we have had comments by people that the word 'offence', for example, is remarkably undefined, and one of the issues is that people cannot control or are not aware of how someone else might respond in terms of what they might feel offended by. Warren Mundine, for example, has talked about the fact that, with the Bill Leak cartoon, some people chose to find offence where there really was no offence there. Do you have any comments as to how the process alone—because I think that was your contention—would stop the case where somebody has chosen to feel offence where there was no offence intended and the broader population would agree that there was no offence intended?

Ms Walters: I think it is hard to say that people choose to take offence about things without knowing all of their circumstances and history and what they have been through. So I would not want to be making that accusation lightly or changing laws on that basis. The way the law has been interpreted by the courts, which I am sure you have heard time and time again, is that it must have serious and profound effects, so mere offence is not going to cut it. And there are the 18D exceptions, which are quite broad, and, with the additional powers that the commission is going to be given to consider terminating complaints, I think again that will capture that concern, if the concern is more about the complaints being looked at by the Australian Human Rights Commission. Again, I have not had time to look at this, but there are provisions for mandatory termination by the commission. I think giving the commission a discretion to terminate, on the grounds that have been proposed in the bill, in the amendment, and I think supported by the commission—I think they are broad enough, but mandatory termination will increase the risk of judicial review litigation, including by respondents, where they feel like a matter should be terminated and it has not been, and by complainants. Again, I note the power imbalance that often exists between respondents and complainants and what that means in terms of access to the courts.

Senator FAWCETT: The reality, though, in the lived experience in the last decade is that the power predominantly lies with the complainant, who is often backed up by the processes of the Human Rights Commission. We have seen, reporting to this committee, that there have been numerous complaints that have been dealt with by the commission and around $1 million in payments that have been made by people seeking to

avoid being dragged into the courts, and the harm is done—this is the argument that has been made by many—by the damage to reputation, by the stress, by the process, and it never, in many cases, reaches the court. So, whilst there is an argument that courts may interpret things to a higher standard, the lived experience of people is that the power, unless you have very deep pockets—and in the case of Bill Leak obviously *The Australian* stepped in to support him, and the QUT students had some very good pro bono work—the vast majority of Australians who are caught up in this, the harm is done to them because the power seems to lie completely with the complainant and the Human Rights Commission.

Ms Walters: I disagree that the power lies with complainants. We have to bear in mind that the proposed changes to the Australian Human Rights Commission Act in the bill will affect all discrimination complaints and that most complaints occur in the context of an employer-and-employee relationship. In my own practice, in terms of being a community lawyer, it certainly was not the case that employees had the balance of power. I am also not aware of lawyers or dollars being paid out at all. I think you are getting at the potential for there to be a chilling effect on freedom of speech. I have not been seeing that effect. The high-profile cases that have prompted this push for reform have been largely against powerful figures in the media who have certainly been able to express themselves and run quite a forceful campaign on changing the law. They have had ample opportunity in the media to push their particular agenda. I am not sure that Aboriginal and Torres Strait Islander groups and multicultural groups have had the same opportunities. In any event, I would note that section 18C is designed to combat racial vilification, and that racial vilification often has a silencing effect on those who are the victims of it. There is research that backs this up, in the sense that people can withdraw from public participation. In that way sections 18C and 18D can be seen as promoting equality in public debate. It is also about balancing fundamental rights and freedom from racial discrimination.

Senator FAWCETT: There are also high-profile people like Mr Mundine who are in the media supporting the change. But the point that is often missed is that because of the confidentiality clauses that the Human Rights Commission places on people who have been subject to conciliation, many of those cases are never seen by the public, and it is only because of this inquiry that we have had some people come forward and start talking, whilst not necessarily revealing the details of the case, but about the impact on them personally and the chilling effect it has had on them. So it is a very real impact on the Australian community that has been largely hidden to date, and only these more recent high-profile cases have perhaps alerted people to what has been occurring behind the scenes.

Ms Walters: Confidentiality is important in having an effective complaints resolution process that makes sure that not many matters end up in court. It is a process that is informal and low cost and designed to be less stressful. I am really concerned about the impact of the changes to the Australian Human Rights Commission Act which I have outlined on the many people who experience sex discrimination, sexual harassment, disability discrimination and age discrimination and often will be in a position in which they have less power than the respondent.

CHAIR: Thank you very much for your time and for appearing before the committee at relatively short notice. We appreciate that.

CAMPBELL, Dr Emma, Director, Federation of Ethnic Communities' Councils of Australia

MARILLANCA, Mr Victor JP, Disabilities Chair, Federation of Ethnic Communities' Councils of Australia

OPPERMANN, Mr Harry, Deputy Chair, Canberra Multicultural Community Forum

RAHMAN, Ms Diana OAM, Chair, Canberra Multicultural Community Forum

[10:59]

CHAIR: I welcome the Federation of Ethnic Communities' Councils of Australia. We invite you to make an opening statement and then the committee will ask questions.

Dr Campbell: Thank you. I would like to begin by acknowledging the traditional owners of the land on which we meet today. I would also like to pay my respects to elders past and present. I am here to speak on behalf of the Federation of Ethnic Communities' Councils of Australia and its members on the proposed changes to the Racial Discrimination Act. I would also like to recognise the importance of the Racial Discrimination Act and the protections offered by 18C to Aboriginal and Torres Strait Island communities, Australia's first peoples.

As director of FECCA, I am accompanied here today by Mr Victor Marillanca JP, a member of the FECCA board and its Disabilities Chair, by Ms Diana Rahman OAM, Chair of the Canberra Multicultural Community Forum, and by Mr Harry Oppermann, Deputy Chair of the Canberra Multicultural Community Forum. I would like to thank the committee for inviting FECCA to give evidence today.

I am sure that you have all seen the video clips on the news with depressing regularity. On a Sydney train a woman shouts at the boyfriend of a young Asian woman, 'You can't even get an Aussie girl—you have to get a gook.' On another train a passenger is confronted by someone screaming, 'My grandfather fought in the war to keep you blacks bastards out.' In an emergency department waiting room in an Ipswich hospital, somebody shouts at foreign students, 'We are paying taxes for you arseholes.' In FECCA's own community consultations, the many stories and successes are too often offset by terrible stories of racism. There is a young girl who told us of her sister's experience. Wearing a headscarf at the shop where she worked, a customer demanded of the manager, 'Why are you hiring terrorists?'

CHAIR: Dr Campbell, this is interesting, but the debate on 18C has been held 2½ months ago with the joint standing committee that dealt with the issue. This committee, in the limited time available, is looking at the provisions of the bill—

Dr Campbell: With respect, the provisions of the bill affect the daily lives of the communities that we represent. It is important for me to show you their lived experience.

Senator WATT: No other witness has been interrupted in giving their evidence, and we should allow the witnesses to speak.

CHAIR: Please ignore the interjection. The time is yours and you can do what you like with it. I am just pointing out that we have limited time and we are very interested in your thoughts on the actual bill.

Dr Campbell: These are my thoughts and the thoughts of my members.

CHAIR: It is entirely up to you. The time is yours.

Dr Campbell: May I continue? These are incidents both caught on video or shared directly with us. But who knows how many more happen on a daily basis around Australia? This is not casual racism. It is naked bigotry played out in public places. Too many of the people that FECCA represent face the daily fear of being offended, insulted or humiliated because of their race. The good news is that for over two decades we have had a law that prohibits offensive, bigoted comments, insulting racial slurs and humiliations. But this week we have been told, with this bill that we are here today to discuss, that we do not need this law any more. The proposed changes to the Racial Discrimination Act send a strong signal that racism—the stories that I have shared this morning—is acceptable: that is that it is acceptable to offend, insult or humiliate someone on the basis of their race, colour or national or ethnic origin.

Changing 18C and weakening the Racial Discrimination Act, as proposed in this bill, would grant a licence to those who want to undo Australia's great, harmonious, tolerant and cohesive multicultural society. The message would be clear: it is acceptable in Australia for one person to verbally attack another, to offend, insult and humiliate based on their race. After nine years of surveys, the Scanlon Foundation has found this year that experiences of discrimination in Australia on the basis of skin colour, ethnic origin or religion are at their highest levels. Put simply, the level of racism in this country is rising.

FECCA believes that the Racial Discrimination Act as it currently stands provides protection for vulnerable communities against racial attacks while defending the right of freedom of speech. Certainly the defence of free speech is an admirable cause, but there is no threat to free speech by the Racial Discrimination Act as it stands. No person advocating for a better Australia has been found to be racist under the Racial Discrimination Act. The Racial Discrimination Act protects those who want to debate, discuss and, yes, even joke about race, nationality and ethnicity. FECCA does acknowledge that improvements can be made to the process for hearing complaints in the Australian Human Rights Commission. This is not a criticism of the Australian Human Rights Commission itself, which has FECCA's full support in its excellent work to prevent racism and discrimination.

Migration has enriched the lives of all Australians as well as our economy and society. The overwhelming majority of Australians accept that multiculturalism is good for this country and has always been good for this country. Governments of all persuasions over decades have declared their strong support for immigration and a multicultural Australia. The Racial Discrimination Act stands as a legal protection and a symbol of our acceptance—our acceptance of the Filipino-Australian care assistant looking after our old people; of the Bangladeshi doctor working in our rural communities; of the Italian nonna taking her time to get on the bus because her hips are not what they used to be. It symbolises our acceptance of the Jewish Australian who chooses to proudly wear his yarmulke to the footy; the Indian student on a train late at night with his head in a textbook. It protects the Lebanese Australians who have given so much to this country for generations and who now find themselves classed as outliers; and the woman from South Sudan who has survived two wars to find safety in Australia for herself and her children. These are the people affected and, let's face it, threatened, by the proposed changes to the Racial Discrimination Act. In closing, I want to put once again the question which has still not been answered by those who want to change 18C: just what is it that Australians want to say that they cannot say now? I welcome your questions and thank you for your time.

CHAIR: Thank you very much, Dr Campbell. Have you had an opportunity to read the bill, and particularly the procedures parts of the bill? Do you have any particular comments about the way the commission might be required to act following the passage of the bill?

Dr Campbell: Certainly we recognise that there is opportunity for improvement to the processes in the Australian Human Rights Commission. It is critical that the human rights complaints mechanisms are designed and maintained in a way that works for the public in its entirety. We would look to the Australian Human Rights Commission for their advice as to how the commission can be best improved to ensure that the complaints and the rights of defendants are properly addressed.

Senator DODSON: This is a question in relation to item 4 of the amending bill. After section 18C, subsection 2, there is a new proposal in subsection 2A that sets the standard for the test of discrimination as the standard of a reasonable member of the Australian community, as opposed to the previous standard. Do you have something to say about that?

Dr Campbell: FECCA believes that the standard by which contravention of section 18C should be judged should not be changed. The test as it currently stands, based on the hypothetical member of a particular group, recognises and reflects the impact that racism has on minority communities, and this is how it should be. I think that a generic reasonable person test would also create the possibility that members of a group that happened to be unpopular at any time for any particular reason would be unfairly treated. Section 18C is not needed to protect members of minority groups which are popular in the wider community; it is needed to protect members of unpopular minorities and also vulnerable minorities, especially our first peoples, Aboriginal and Torres Strait Islanders.

Senator DODSON: My second question goes to clause 36 of this amendment bill, particularly proposed section 46PF(7). It says that the president now must notify the complaint to the respondent unless the president is satisfied that the notification would be likely to prejudice the safety of a person. Have you got any response to that?

Dr Campbell: In the short time that we have had to review the bill and given FECCA's interest in representing its community, it is not an area of the bill that I have paid particular attention to, my apologies.

Senator DODSON: Maybe I could put the question slightly differently. Do you think people would be inclined to bring complaints forward if they were aware that the president now must notify the respondent—that is the person causing the trouble—unless the president thinks that there is going to be some harm caused to the complainant?

Dr Campbell: I think we should be making changes to improve the accessibility to the complaints mechanism and this is not a way of improving it. Maybe Mr Oppermann would like to add.

Mr Oppermann: Yes. I would like to thank everyone for inviting us today. In relation to the previous discussion, in my opinion the Racial Discrimination Act as it now stands has given the powerless a voice which they otherwise would not have had an opportunity to access. I am not a lawyer; I am a retired teacher and academic and also Vice-Chair of the Canberra Interfaith Forum, so I might inject an element of that. I was a former teacher of religion and values education. I can see a situation where such an event would jeopardise the complainant. I give that answer in relation to the concept of powerlessness. Generally those making the complaint have been given an opportunity by this act which they otherwise would not have had. To have a situation where they are put in jeopardy, either in their employment, social standing or some other domain, I think is a potential threat to limit any future complaints.

Senator DODSON: Thank you.

Senator McKIM: Thanks, Dr Campbell, for your opening presentation. That was extremely instructive for the committee. This may be one for you, Dr Campbell, or for the other representatives of FECCA here. Could you outline for the committee the impacts of racism not only in terms of mental health and how people feel but in terms of physical health? Is it the case that when people have been the victim of racist behaviour or subject to racist behaviour they feel powerless and less likely to speak out themselves on issues?

Ms Rhaman: As you know, I am the chair of the Canberra Multicultural Community Forum, and awhile back we were approached by Canberra's Indonesian community. Before I start, Canberra is probably one of the most successful multicultural cities in Australia today, and our levels of racism are probably the lowest in comparison with every other state and territory. But even within that context the Indonesian community contacted me, for example, because they were getting increased levels of racial abuse and they were concerned that it was going to maybe approach to the next level. The community did not know where to go and who they should speak to. So, we organised an event for the community. We had about 100 people from the Canberra Indonesian community turn up to an event. I brought in the ACT deputy chief of police and the ACT discrimination commissioner and we sat on the panel to field questions from a community that is very anxious, who did not know when they were being spat at when dropping off the children at school, who when riding a bike had verbal abuse hurled at them, or when they attended events only to receive verbal abuse—being scared and not knowing where to go, what to do and who to speak to. So, we were able to provide an environment in which we outlined some of the places they could go.

And, as we know, it is the women—people who look like me, wearing a hijab—who often bear the brunt. And I often say to many people, 'Come and stand in my shoes for a day, to understand the levels of anxiety, the levels of the unknown, of where the next step will be.' No matter how well we do within our own communities and the work that we do, there are other factors that are at play in Australian society today that are having a huge impact on the way we are able to go about our ordinary, everyday lives. The youth are in fact the ones who are bearing the huge brunt. They are not living a normal life in childhood, growing up in Queensland and being able to run around barefoot and not worry about the world's issues. I do not see children having that ability anymore, because they are so impacted by social media.

Harry has wonderful insight into social media, and he can talk about that. But children are not given and do not feel as if they have the normal life their parents had, because they are having to deal with bullying at school on a regular basis—being called a terrorist. They are having to go about their everyday lives always being aware, being pointed out, especially if they have a skin colour that is different from white. So, they are really impacting on a community, and a lot of it is not being reported. What we know, and what does get reported, is only a drop in the ocean, and that is what is affecting the community.

Senator McKIM: Mr Oppermann, if you would like to add anything, please feel free, but I wanted to ask you specifically, given that you have just told us that you are a former teacher, I think you said.

Mr Oppermann: Yes.

Senator McKIM: Would race based bullying at school have the potential to impact on educational outcomes for people who suffer that kind of behaviour?

Mr Oppermann: Thanks for that question. I think all the research indicates that it has an impact on mental health. Also, we are all aware much more these days of the connection between mind and body, that one impacts the other in both directions. So, I think we cannot dismiss, and the research indicates, the evidence of the effects of racism—which is a form of bullying, after all, and can often become more violent than bullying—on both mental and physical health. The research is there. The outcomes are statistically reliable, and they are all negative.

To give you one brief example, a few years ago one of my students was of an ethnic Korean family but born in Australia. I was teaching after retirement at Canberra Grammar, in religion and values education. He walked

home from school and he said that every day someone would yell out to him from a car, 'Go back to where you came from!' He said, 'I'm born here; where am I supposed to go?'

That idea of not belonging, that idea of giving permission to the creation of disharmony, is one of the most damaging aspects to the idea of the many voices of one Australia, the idea of unity of us. I am a former teacher of Australian studies at university as well. I think it does have an impact. And the other thing is that I do not understand, in terms of language in the playground—I will give the example of a fight between two students that turns to racist abuse. A teacher intercedes and says, 'You can't use language like that', and the other student, being a bush lawyer, as so many of us are in Australia, says, 'I can do anything I like; the Attorney-General of Australia said every Australian has a right to be a bigot.' Now, I know that Senator Brandis did not intend to give an open charter to that kind of behaviour. I do accept that. Nevertheless, it does point to the importance of the political, social, moral, religious and ethical leadership of this country to give a guidance to the population at large. One example I can give is our current Governor-General, before he was appointed. He was the first one to outline that in Victoria the attacks on students of Indian origin, people of Indian origin, was in fact racism. It was not until he came out publicly as a former Head of Defence Force to say that that the deputy commissioner of police also reiterated that point, which he had never made before.

As the famous Dr Phil says, 'You can't fix a problem unless you acknowledge it,' and we are not sure that changing the wording is in fact an acknowledgement. For example, why would we allow in daily conversation, in the street, language that is not permitted on any football field or any house of parliament of the nation? I see politicians harass one another regularly on television when I am looking at video of what happens in the Senate and the House, and I do not see them being suspended. But I do see them being suspended if comments go beyond that.

Senator FAWCETT: Dr Campbell, thank you for your opening statement. Regarding the examples you gave—and also Ms Rahman—I do not think you would find any person here who would ever support the kind of conduct where an individual was intimidated or harassed in the way you outlined. That is a very different thing, though, to somebody choosing to take offence to a cartoon in a newspaper. Yet what we are seeing are the kinds of harms that have been outlined by Mr Oppermann and Senator McKim about the mental anguish and stress and physical impacts on people who are caught up because they put forward a view which somebody in a broader group chooses to take offence to. I think that is the nub of this issue, because the government is seeking to strengthen the law to protect the people you have highlighted, and we all agree they should be protected. If somebody is intimidated or harassed in that very personal one-on-one way, they should be protected. But in the case of somebody who chooses to take offence about something like a cartoon, can you explain why we should not be seeking to protect that person, who has expressed a view in good faith.

Dr Campbell: Again, I would challenge your use of the word 'choose', because until you have had the lived experience of somebody who is abused on their way home from work, who has spent a lifetime being intimidated or insulted and humiliated, you cannot understand what it feels like to see those kinds of cartoons or have those kinds of experiences. Let's be clear: 18C and 18D allow a freedom for speech. The Bill Leak case was dropped by the complainant. And by the way, 18D allowed for satirical and humorous comment.

Senator FAWCETT: But the 18D case did not protect Bill Leak from the process which caused him all the stress. Also, there are people who have lived that experience, like Mr Warren Mundine who has come out very clearly and made that exact point. That is his point rather than mine—that some people have chosen to take offence as opposed to looking at the real message that was behind Mr Leak's cartoon. I have lived as a minority in another country, so I actually have walked partly that way. Mr Mundine is one of the group that you have identified here who has walked his whole life in those shoes, and yet he looks at this in a different perspective.

Mr Oppermann: It is an excellent question and a point that you have made a couple of times. One of the aspects that I have from my faith and the philosophy is not to argue from the specific to the general in terms of logic. While I understand the point that is made, the current provisions of 18D would have automatically excluded Bill Leak from any prosecution at all.

CHAIR: Automatically?

Mr Oppermann: When I say 'automatically', I mean by definition of the act and the wording of the act.

CHAIR: Sorry, I should not have interrupted. I was just thinking about the—

Senator PRATT: The politicisation of it was the problem, not the law.

Mr Oppermann: Yes. The other thing I want to say in relation to that is it is not always choosing. I do not want to bring this up as a marker, but it happens to be my family history. Not a single person of my mother's family or entire circle of friends was left alive after World War II—similarly from my father's family. Both my

parental families were murdered in their entirety. I know of no ethnic cleansing, massacre or genocide in human history which was ever prevented by good speech. As important as good speech and moral guidance is, evil words lead to evil deeds. That is one of the lessons of all the major faiths—of all the major tech space faiths—and it happens to be a reality.

The kind of protections that we are requesting to stay are in the interests of a moral, ethical and harmonious society because of the propensity, particularly, of social media. I do not believe that our regulatory authorities have really kept up to date with the negative impacts and the degree of abuse. There was one recently after the Bourke Street pedestrian run down—you remember that the offender drove down pedestrians in Melbourne. That was not terrorism. He was obviously disturbed, whatever the case. But one person, a reasonably well-known actor who had big parts on *Home and Away* and *Underbelly*, with 18,000 followers on social media started ranting about this young 10-year-old girl, Talia Hakin, and how it did not happen—it was all a figment. He was a conspiracy theorist with 18,000 followers.

We have to understand that there are people out there in cyber racism who are causing untold damage to all sectors of the unity of Australia—of the ethical and moral good of Australia. There has to be something stronger than what is proposed by the word 'harass', in our view, because we do not feel that that really does it. It is not a question of choosing. People who were killed because of racism, bigotry, humiliation and vilification did not choose to die. It is not a question of choice. As important as that question is, one swallow does not make a spring, as the saying goes.

CHAIR: Dr Campbell and your colleagues, thank you very much for coming to be with us and for your evidence. We will send you the transcript if there are any corrections to make. Thank you very much for coming and assisting the committee.

EDGERTON, Mr Graeme, Senior Lawyer, Australian Human Rights Commission

SOUTPHOMMASANE, Dr Tim, Race Discrimination Commissioner, Australian Human Rights Commission

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

[11:30]

CHAIR: Welcome. We have your submission, which was received this morning. Thank you very much for burning the midnight oil obviously to give us your seven-page submission. The committee appreciates that. I am not sure that too many committee members have had the opportunity to study at in detail so whether you want to touch on some of those things in your opening address is up to you. We have little over half an hour for this. Would you like to make an opening statement?

Prof. Triggs: We appreciate the opportunity to give evidence to this committee. I will not make a formal opening statement because we have produced a quite, as you say, comprehensive statement about the provisions of the amendment bill. I would like to just say very few things about it, which largely repeat the essence of what we were saying.

Firstly, I think it is very clear that we do not approve the changes to the substantive provision of the Racial Discrimination Act. We believe that the provisions operate well as they have currently been interpreted by the Federal Court for 20 years. I have perhaps especially concerned that the concept of 'humiliation' should be taken out. And it is curious to say the least that the word 'harassment' has been added, especially when the definition of the word harassment in the Sex Discrimination Act takes you right back to the precise language of 'offend', 'humiliate' and 'intimidate' so it is an entirely circular process, highly unsatisfactory as a drafting proposal.

We are also deeply concerned by the notion of the reasonable test. The courts have applied a reasonable and objective test for some 20 years and to play with that jurisprudence in this way is unhelpful, and, in fact, potentially making the situation for vulnerable people even more difficult than it is at the moment.

Turning to the procedural changes, we fully accept that changes to the processes of the Human Rights Commission called for. We have for many years been asking for these changes. We are very pleased to see a significant number of the recommendations made by the inquiry have been picked up through the drafting for this bill and we support them. There are some, however, that we do not support and three in particular that a matter of concern to us. To put in general terms, we are concerned that these provisions will limit the capacity of Australian citizens to have a voice before the Australian Human Rights Commission. Very little can stop them ultimately going to court. We provide a free, efficient and fair system for conciliation matters before they need to go to court. To place a chilling effect on that or to limit the capacity for access to the courts through these recommendations is very worrying.

But can I emphasise that we have been very pleased with the number of the recommendations that have been made, particularly by the parliamentary joint committee. We think the recommendations have been extremely helpful. They have picked up our suggestions. However, it is a matter of some concern that the bill as introduced has failed to accurately represent the recommendations of that committee. The speed with which this is happening is also troubling. We have had months, years indeed, to consider these issues. We have been raising them for years. To have a bill introduced with very few days to consider it and to bring these changes in without an understanding of the impact on the access by Australians to the courts is a matter of deep concern to the commission.

Thank you very much for giving me the opportunity to speak to you today; we really do appreciate it.

Senator PRATT: It appears that you have been consulted on some of the procedural changes but not at all on the substantive changes to 18C of the Racial Discrimination Act. What, if any, consultation has occurred in relation to the substantive changes to the definitions within 18C?

Prof. Triggs: In relation to the amendment bill that has just been introduced, we have not been consulted with regard to the substantive changes to the Racial Discrimination Act. We have been consulted about some of the recommendations made by the parliamentary joint committee in relation to our processes.

Senator PRATT: How is it possible that the procedural parts are covered but not the substantive issue of the test of the Racial Discrimination Act?

Prof. Triggs: I am afraid you really do have to ask the Attorney that.

Senator WATT: Could I just pick up on one aspect of that, Professor Triggs. Those of us who have been in the Senate this week have heard Senator Brandis over and over again cite you as one of the people supporting these changes. To give you one example, on Wednesday, I think it was, in answer to a question, he said:

I do not know any serious person who has studied section 18C as it is currently written who would defend it as the best possible way in which this law could be expressed—not Professor Gillian Triggs, the President of the Human Rights Commission, who has said that the law could be improved …

Do I understand your evidence to be that if there is any implication from Senator Brandis that you support the change to the wording of section 18C then that is not correct?

Prof. Triggs: That is categorically not correct, and we have been consistent for at least the last 2½ years in all of our submissions in saying that the current language has worked extremely well, and the Federal Court has interpreted that language in a way which is predictable, and fair, and consistent with, I think, a reasonable understanding of the seriousness of any offence, insult, humiliation or intimidation.

Senator PRATT: Dr Soutphommasane, do you believe that the changes will strengthen or weaken protections against racial hate speech?

Dr Soutphommasane: If you are referring to the proposed changes to part IIA of the Racial Discrimination Act, I have concerns that it may weaken the protections we currently have against racial abuse and vilification. It may signal to the community that conduct which offends, insults or humiliates people on the basis of their race may be acceptable or justified. We also have 20 years of judicial consideration of the current provision, and the full effect of replacing 'offend, insult and humiliate' with 'harass' would not be known until courts had had the opportunity to reflect on that. It is likely that if there is a change enacted to the Racial Discrimination Act of the sort proposed that there would be an increase in litigation, because sections of the community would wish to have judicial consideration of the meaning of the word 'harass'.

It is also worth noting that many communities in this past week have expressed very strong concerns that the proposed changes represent a weakening, rather than strengthening, of part IIA of the Racial Discrimination Act.

Senator PRATT: Does this include a belief that victims of racial abuse could be less likely to put complaints forward?

Dr Soutphommasane: You may well have situations where someone has experienced serious racial vilification which involves racial offence, insult or humiliation which would not be captured by a new law. You may have a situation where people may not have a remedy for acts of racial abuse or vilification if there is a change to the language. So, in short, there is a danger of the sort that you are alluding to.

Senator PRATT: Thank you.

CHAIR: Senator McKim.

Senator McKIM: Good morning, everyone, and thanks for coming in. When did the commission first see the legislation that is before the committee? I guess a supplementary question to that is: was it provided to you at any stage by government before it was tabled in parliament?

Prof. Triggs: We were provided with a copy confidentially the day before it was introduced into parliament, I believe with the good faith objective of discussing it with us before the bill was finally introduced.

Senator McKIM: Was it the department or the Attorney-General's office that provided it to you?

Prof. Triggs: It was the Attorney-General's office.

Senator McKIM: So the Attorney-General's office sent it to you the day before it was tabled. Was there an opportunity given for the commission to respond to the Attorney or his office on the details of the bill?

Prof. Triggs: Yes. We had a videoconference meeting to go through the provisions, and we raised the issues that are of concern to us, which I have reproduced in the submission we have given to you. I appreciate that you have not had time to read it in detail—

Senator McKIM: I have, actually.

Prof. Triggs: Thank you very much. Basically, it was an opportunity to go through it. We had a matter of hours—I think it was literally a matter of hours—to go through it. We went through it as quickly as we could. We were very pleased to see some of those provisions; others we raised concerns about.

Senator McKIM: I understand that some of the provisions in the legislation that is before us do actually reflect the commission's view and previous submissions that the commission has made to various parliamentary committees. Given that you have just said that you did reflect back to the Attorney some of your concerns about

some of the provisions, were any changes made to the legislation to reflect those concerns that you outlined to the Attorney?

Prof. Triggs: The bill that I believe you are considering has not been changed since that meeting.

Senator McKIM: So, even though you were given an opportunity, albeit at very short notice and with very short time frames, to outline your concerns, none of the concerns that you outlined to the Attorney were taken on board to the extent, at least, that they were reflected in the legislation that was tabled the next day?

Prof. Triggs: No, none have yet been articulated in the bill that you have before you.

Senator McKIM: Thank you.

Prof. Triggs: But I should say that there was very little time to achieve that, I understand. I have, at the moment, to respond to the bill as you have it before you.

Senator McKIM: I absolutely understand and accept that, Professor Triggs. Thank you; that is very clear. I just wanted to take you—feel free, obviously, to refer these matters to any of your officers if you wish—specifically to the accept-reject phase, which is one of the matters that you have outlined in your submission to this committee, and you have just given evidence that you outlined your concerns also to the Attorney-General. Could you explain why you believe there is a possibility that the insertion of a mandatory accept-reject phase might cause additional delay and added costs to parties.

Prof. Triggs: As you may know, evidence was given to the Parliamentary Joint Committee on Human Rights from Tasmania, which has had a similar provision. The then head of that commission gave very strong evidence to explain that what it does is create an interim process of litigation which will hold the entire process up. The point being—and as this is currently expressed in item 31—that, if the president is of the opinion with regard to matters under section 46PH that the complaint should be terminated, it should be terminated without inquiry. The point is, quite appropriately within administrative law and principles of natural justice, that somebody who suffers the consequence of that expression of opinion by the president has the freedom to go to the courts to challenge it. The entire point of our complaints process is to have a voluntary process in which the parties come together to, hopefully, conciliate the matter. If it injects a legal challenge process in the middle of it then immediately you go from a free, confidential process of conciliation to a potentially expensive and lengthy process of judicial determination. We think that that is a retrograde step and that it will retard the ability for the commission to get what at the moment amounts to a 76 per cent success rate of conciliations.

Senator McKIM: Would it be fair to say that, if this provision did become law—if the bill as currently drafted did pass through the parliament—it would have the potential, at the very least, to undermine one of the very reasons that the commission was created: to provide people with an opportunity to resolve matters before the courts became involved?

Prof. Triggs: Yes, it is a very serious undermining. I mentioned before that we have three primary concerns, and one of those is the item 31 that you have raised.

Senator McKIM: I want to take you to the last point that you made in the submission that you have provided, which is around privacy and confidentiality. Your submission says that:

> If the parties were aware that any offer they may make or receive during the course—

Prof. Triggs: Yes.

Senator McKIM: You obviously know the rest of that sentence. The thrust, as I understand it, is that there is the possibility that parties:

> … would be less likely to engage meaningfully in the Commission's conciliation process.

Would it be fair to say that if that section of the bill passed unamended, again, it might at least potentially undermine one of the very reasons that the commission was established?

Prof. Triggs: It undermines one of the primary values or purposes of a conciliation process. In other words, through our accredited conciliators we encourage the parties to raise any issues that they want to raise, any ideas for conciliation, in the hope that this can bring the parties together. If they knew that those offers would then, could then or should then as a consequence of these amendments be taken up by a subsequent court or judicial proceedings, we would see that as having a very significant chilling effect on the freedom of the parties to play with ideas at the table. I think this drafting suggests a failure to understand the difference between a judicial determination and alternative dispute resolution which is conciliation based on the voluntary participation of the parties.

Senator McKIM: Dr Soutphommasane, obviously you engage a lot with the full range of multicultural communities in Australia. I understand you have done it in previous inquiries, but can I ask you to outline for this

committee for this specific inquiry into this specific legislation what your view is on the message this would send out into the broader Australian community around whether racism is tolerated or permitted in Australia and what the consequences might be. Do you have a concern that taken as a whole the changes to section 18 of the RDA that are contained in this bill send, if you like, the wrong message out into the broader Australian community?

Dr Soutphommasane: There is a very real danger that it would send the wrong message to Australian society. Our laws should express our commitment to racial tolerance, civility and respect. The Racial Discrimination Act sets a standard for what is acceptable conduct in public. We should not be licensing parts of our society to believe that they can racially offend, insult or humiliate others with impunity and claim a complete or absolute defence under freedom of speech. Freedom of speech is a vital freedom in our liberal democracy, but it is not an unfettered or absolute freedom. In a multicultural society such as ours I would hope that our laws can help set the tone for racial harmony and tolerance.

Senator XENOPHON: Professor Triggs, this is a matter that has not been canvassed in the joint standing committee inquiry, and excuse my ignorance, because I do not know this: when a complaint is before the commission, is there a requirement for it remain confidential, or can one party break the confidence of that? I am thinking of cases where there may be a frivolous or vexatious complaint and if the complainant discloses the name of the respondent—and vice versa, for that matter—that could cause unnecessary distress.

Prof. Triggs: I do not believe this was discussed and I am grateful for the question. There is no binding legal obligation on the parties to maintain confidentiality. That reflects the fact that this is an entirely voluntary process. If the parties do not want to be part of it, they do not need to be. However, all conciliation processes really depend for their effectiveness upon confidentiality. In 99.9 per cent of cases—probably more than that—parties do not go into the public arena, but in rare cases they choose to put their argument in particular segments of the media. That is their privilege. They are entitled to do that if they choose to do so, but we strongly encourage parties not to do so, because the moment that one-sided allegations are made and reported in the media then you have pretty much lost any possibility of conciliation.

Senator XENOPHON: I am considering whether there ought to be a further amendment to the bill. You may want to take this on notice. What would the view of the commission be if there were a requirement that confidentiality be maintained up until the end of the conciliation stage, so that it would be prohibited for people to disclose the fact that a complaint had been made or who the complainant or respondent was? Sometimes simply being subject to a complaint, even if it is not meritorious—or particularly if it is not meritorious—could cause great distress to the respondent.

Prof. Triggs: I think that that is a suggestion well worth considering. I would like to take it on notice. But can I say that, were the processes of the commission not available to the Australian public, they would go to the court. Once they go to the court then all public documents introduced into the court are available. Unfortunately, in any adversarial system of complaint, whether it is to a commission like ours or to the courts, there is always stress. We deeply regret that stress to all of the parties, but it is a phenomenon of the adversarial system that we have under the common law in Australia. Maybe one could consider that there be a confidentiality requirement in the statute for conciliation purposes, but I think we would like to look at that to see whether there are any unforeseen consequences or whether it might be inconsistent with the general principle of voluntariness that I have already alluded to in relation to conciliation processes. We will take it on notice if we may, and we will get back to you as quickly as we can.

Senator XENOPHON: If you could, come back early next week with drafting instructions.

Mr Edgerton: If I could add to that answer that Professor Triggs has given, in relation to the documents that are made public when a case goes to court, the commission's complaint file is not made public, but the matter is then in the public domain, so there will be documents that are filed in court that will be public. But, for example, the complaint that is initially made to the commission would not be one of those documents, and matters that occur during the commission's conciliation process would not as a matter of course become public documents.

Senator XENOPHON: I understand that it is when one party decides to disclose the events to the other, and I guess it can cut both ways. You may feel constrained from commenting on this, but obviously the matter involving the artist the late Bill Leak has been the subject of much public media commentary. Do you consider that the proposed changes would have meant that the late Mr Leak's matter would probably have been disposed of much more expeditiously, given the wording and given the defence in section 18D?

Prof. Triggs: Perhaps I can begin by repeating on behalf of the staff and commissioners of the commission our condolences and sadness at the death of Mr Leak. Having said that, it is extremely difficult for us to consider this question in abstract terms, but as I have said before to the parliamentary joint committee, I think the

complaint made by Ms Dinnison in relation to the cartoon raised an 18C issue. The question as to whether there was an exemption because of 18D depended upon a number of factors—public interest, accuracy and good faith—all of which would need to be determined on the facts. It is at least likely that were we to have received a submission on those matters the Leak case could have been terminated somewhat earlier. But because we did not receive a submission on that matter I cannot in the abstract determine whether that would have been the outcome.

Senator HINCH: Professor Triggs, this review seems to be coming in two parts. I want to raise it because maybe the government eventually will split the bill and make one for what I will call the 'insult, offend and harass' part of it and another for procedures. I think the government may find the procedures part may be easier to get through the Senate than the other part. Talking about procedures, when you attended a recent estimates committee hearing on the issues the Bill Leak case came up. You said that if he and his lawyers had followed procedures and if he had replied about good faith, I think your words were that all of it would have been over more quickly.

Prof. Triggs: You have not repeated my words accurately, but the spirit of it is that had we had a response or a submission in relation to the 18C exemption there is at least a high probability that the matter would have been resolved within days or very quickly.

Senator HINCH: But you actually used the words 'good faith'. I remember it very clearly. We got out of that hearing that day and I got a call from Bill Leak's lawyers. Justin Quill said that they had actually written to you on 21 October last year saying, 'the cartoon was created "in good faith" and for a "genuine purpose in the public interest" in accordance with s. 18D(b), namely to promote thought and discussion surrounding problems afflicting youthful offenders in remote Aboriginal communities'.

Senator McKIM: A point of order, if I might, Chair. The point of order is that we have a hearing of the relevant committee this afternoon which Professor Triggs will be attending. If this matter is to be opened up in this committee I want it placed on the record I have a number of questions on this matter.

CHAIR: That is not a point of order.

Senator McKIM: I would just urge you, Chair, in the interests of time, to suggest to Senator Hinch that the matter be raised in the committee in which the original evidence was given.

CHAIR: Thank you. There is no point of order. I will certainly be raising it this afternoon in that committee, but Senator Hinch is able to do this. I just note for the record that at last estimates we had two hours of questioning about the Bell matter, which was subject to a special select committee. That also happened at estimates.

Senator HINCH: Chair, I just have two quick points.

CHAIR: There is no point of order, Senator Hinch.

Senator HINCH: I raised this issue with the deputy chair at our meeting yesterday. I cannot be here this afternoon. It is about procedures and it ties back to where we were. I would just say to Professor Triggs: he said that, and you saw in *The Australian* a page of letters back and forth. You raised the words 'good faith' and I recall it quite openly. Then the lawyers said, 'We wrote that letter in October and it's in good faith.' Shouldn't it have been cleared by 18D straight away?

Prof. Triggs: No, Senator Hinch. I am afraid that you perhaps have not had time to read the correspondence. The position is entirely the reverse. Everything I said at that estimates committee in response your question was 100 per cent unequivocally true. I can go through this. We have given you the chronology, or at least the parliamentary committee has the chronology. I think you know very well that the response in the correspondence from the lawyers was to refuse to make a submission. I can give you the exact quotations and I can run through that now for the record—

Senator HINCH: I am happy to leave it for a time. I have other things to talk about here. I will leave it until later.

Prof. Triggs: But you have raised this.

Senator HINCH: If you are coming on this afternoon you can answer it, I am sure.

Prof. Triggs: Yes, but you will not be there, and you are the one, I understand, who has been making comments in the media and otherwise that we have misled a committee at Senate estimates. That is a false statement and I believe that I am owed an apology. You have completely misunderstood the position and you have ignored the reality of that correspondence. It is very clear to anybody who chooses to read that correspondence that you have misled the Senate itself in making the allegations.

Senator HINCH: I do not accept that, and you are not getting an apology from me.

Prof. Triggs: No, I am sure you do not. Can I read now, because you raised the issue, and it concerns the reputation of me, personally, as well as the work of the commission. I think I am entitled to at least a minute to explain and answer your question, because you have raised it, and you have made the points in the media in a way that is utterly irresponsible in relation to the truth.

Senator HINCH: I do not accept that either.

Senator WATT: Perhaps we could hear from Professor Triggs.

Prof. Triggs: So I would now like to be able to explain the position—

CHAIR: Order! Professor Triggs, can I just caution you about references and imputations about senators, generally, but members of this committee, in particular.

Prof. Triggs: Well, I think it is important to speak the truth, and I have been doing my best to confirm the truth—

CHAIR: Well, so do I, and this is an issue we will be dealing with later. I do not agree with your interpretation.

Prof. Triggs: and I have done so with Senator Hinch—

CHAIR: I do not agree with your interpretation.

Prof. Triggs: and he has ignored all the correspondence or failed to read it—

Senator WILLIAMS: Professor Triggs, the Chair is speaking.

Senator McKIM: Point of order, Chair.

CHAIR: I do not agree. Now Professor Triggs, please, we have you—

Senator WILLIAMS: Talk about bloody bad manners!

Senator McKIM: Point of order, Chair.

CHAIR: Just hang on a second.

Senator PRATT: There is a point of order before you.

CHAIR: Yes, I know that, Senator Pratt. I have indicated I would come to the point of order. I am just telling the committee we have limited time to look at the bill, but I will take the point of order.

Senator McKIM: The point of order is this, Chair: you have just interrupted Professor Triggs when she was attempting to answer a question from Senator Hinch. The fact of the matter is that Senator Hinch—in my view—has defamed Professor Triggs—

CHAIR: Well I am not interested in your views.

Senator McKIM: and she absolutely deserves an opportunity, here and now, to go through these matters in as much detail as she wishes while Senator Hinch is here at the table.

CHAIR: There is no point of order, but, again, can I advise the committee, we have limited time to deal with the bill, which is what this hearing is about. This matter is something—I can assure you—will be raised this afternoon in some detail, but if the committee wants to not deal with the bill but deal with these periphery matters—

Senator WATT: I think it is appropriate. Senator Hinch has raised this issues because he cannot come this afternoon. I think Professor Triggs is entitled to a brief period of time to respond.

CHAIR: All I am saying, Senator Watt, is I do not want you then complaining that you did not get a chance to ask a question about the bill, which is what this inquiry is about.

Senator WATT: We have asked plenty of questions.

CHAIR: Professor Triggs.

Prof. Triggs: In response to your question—which I will read, for absolute clarity—a not entirely comprehensible question, but one that said:

… people were calling up to complain, and the Doctor said, 'You have some complaints about Bill Leak.'

You then asked:

Why was that not pointed out to them immediately, the complainers, that it was 18D and he was in the clear?

I said:

There is a very important reason for that, and that is because 18D requires a good faith element. We gave Mr Leak the opportunity to advise us that he had produced that cartoon in good faith. Had he responded by making a good faith point, we

would almost certainly have ended the matter precisely at that moment. But, despite at least two requests to him to justify an 18D basis for the cartoon, we received no response.

You then went on to say:

But a cartoonist could be forced to do this every day. It is satire; it is satirical and it is fair comment.

And I said:

It may very well be fair comment; it may very well be in good faith; it may be part of an artistic exercise; it may be accurate. All of those things, however, have to be suggested—in particular the good faith view has to be put by the respondent themselves. In any system in which you have a process of making a complaint … there must be an opportunity … for the principles of natural justice, where the party complained against has an opportunity to explain what the justification might have been. In the Leak case, that justification was never provided, so the matter was ultimately terminated.

The lawyer, aptly named Mr Quill, wrote us a very long letter on 21 October, saying, 'Our clients require that the Australian Human Rights Commission take no further part in any inquiry into, or attempt to conciliate, this complaint.' The lawyer, on behalf of the clients, said, 'They allege the commission was biased. An external delegate or public inquiry should be set up.' The letter concluded by saying, 'Our clients have nothing further to say to the commission.'

A schedule was attached to the letter, setting out issues that might be raised if an external delegate were to be appointed. In particular, the lawyers wanted a public hearing, and they anticipated that Mr Leak would then, and only then, give evidence to establish an 18D exemption. The firm confirmed that the schedule did not contain statements about 'the kind of evidence our clients consider relevant to the complaint'.

In short, the commission was expressly told that the letter was not a submission about section 18D or the free speech issue. I considered their allegations of bias and found that they were not demonstrated, and on the same day the commission wrote again to the lawyers for *The Australian* and for Mr Leak and a second time sought a submission about the free speech exemption. Again, the lawyers responded saying, 'We confirm that Mr Leak does not intend to make any submission to your inquiry, whether in writing or otherwise.' Within three days of that letter, Ms Dinnison withdrew her complaint and the respondents were advised accordingly.

In summary, when the commission received a complaint from Ms Dinnison, a member of the Aboriginal community, in a comprehensive and clear complaint, we notified Mr Leak and *The Australian* and asked for submissions in relation to freedom of speech. No such submissions were provided, and indeed the correspondence from the respondent's lawyers was that there would be no such submission. The complaint was withdrawn, the file was closed and no further action was made by the commission.

Senator HINCH: You mentioned the letter of October 21. Why wasn't it sufficient for you for a cartoonist, a satirist, when his lawyers say that the cartoon was created in good faith and for a genuine purpose in the public interest in accordance with section 18D? Why wasn't that enough?

Prof. Triggs: The answer is very simple. They had said to us, and I quote—

Senator IAN MACDONALD: Excuse me, Professor Triggs, that will have to be the last question, but we will get the answer.

Prof. Triggs: I am allowed to answer the question, I believe. If it has been asked, I am entitled to answer it.

Senator IAN MACDONALD: I have indicated I would like you to answer it. I was just telling Senator Hinch that this was his last question.

Prof. Triggs: I have just read this out into the record, and I will repeat it again. I have sent it in correspondence to you, and I have said it on numerous occasions. The law firm told us that the schedule that contained that statement was not to be used as the kind of evidence that the clients considered relevant to the complaint. Therefore, we were expressly told that the schedule, that you have insisted on repeating, was not to be taken by us as a submission to section 18D. This was the advice of their lawyers, and it may not have been very wise advice, but it was clearly the advice that was given.

Senator FAWCETT: On notice, could you give the committee and indication of the level of consultation around the process reforms that occurred between the government and the department and the commission?

Senator PRATT: I think that is in the submission.

Prof. Triggs: I think I just answered that, and it is in the submission. As I have explained already, the attorney purposely gave us access to the bill, and I believe I have had total of three meetings.

Senator FAWCETT: Sure, but even before the bill, my understanding is that there was some consultation leading up to the drafting of the bill.

Prof. Triggs: I would have to take that on notice. I would really have to check the records to see just—

Senator FAWCETT: Which is why I just asked if you can take that on notice.

Prof. Triggs: We will take it on notice.

Senator IAN MACDONALD: Just while we are on that point, the committee might resolve that midday on Monday is the time for answers to questions on notice, bearing in mind we have to report on Tuesday—if the committee is happy with that and if that is at all possible.

Prof. Triggs: It may not be possible, but we will do our best.

Senator IAN MACDONALD: That is the committee's resolution. We would appreciate if all questions, not just yours, taken on notice, were back to us by midday on Monday, so that we have the opportunity of considering them before we make a report to the Senate.

CHAIR: Thank you for coming along in response to our invitation. We appreciate you being here.

McLEOD, Ms Fiona, President, Law Council of Australia

MOLT, Dr Natasha, Senior Legal Advisor, Law Council of Australia

MOSES, Mr Arthur, SC, Treasurer, Law Council of Australia

Evidence was taken via teleconference—

[12:08]

CHAIR: We now call the Law Council of Australia. I understand Dr Molt is here in person, and we also have Ms McLeod, the president of the law council and Mr Moses SC, the Treasurer. Would any of you like to make an opening statement?

Dr Molt: We thank the committee for the opportunity to appear before you this afternoon as part of this inquiry. This bill would amend section 18C of the Racial Discrimination Act and the complaints handling processes of the Australian Human Rights Commission under the Australian Human Rights Commission Act. In particular, it would redefine conduct prohibited by section 18C of the act. The conduct that is defined to encompass the notion of racial vilification is proposed to be amended by removing the words 'offend', 'insult' and 'humiliate' in paragraph 18C(1)(a) and replacing them with 'harass'. It would also introduce the reasonable member of the Australian community as the objective standard by which contravention of 18C should be judged, rather than by the standard of a hypothetical representative member of a particular group.

Further, the bill will amend the Australian Human Rights Commission 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 the Federal Circuit Court. The Law Council maintains the view, first expressed in submissions in 2014, that sections 18C and 18D of the Racial Discrimination Act, as interpreted by the courts, strike an appropriate balance between freedom of expression and protection from racial vilification, and should not be amended. We are guided by the objects of the act and the judicial interpretation of the provision in case law over the last 20 years.

Part IIA, including sections 18C and 18D, gives effect to important international obligations under the International Convention on the Elimination of all Forms of Racial Discrimination. It commits all state parties to 'prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law', to personal security and to all civil, political, economic, social and cultural rights.

We support a proportionality approach in recognising both the right to freedom from racial discrimination and vilification and the right to freedom of speech and expression. The act as it stands achieves this, according to the case law. Justice Allsop, the chief justice at the time, remarked in Toben and Jones that Part IIA of the act provides for the balancing of free speech with 'legal protection to victims of racist behaviour', 'the strengthening of social cohesion and preventing the undermining of tolerance in the Australian community' and the 'removal of fear because of race, colour, national or ethnic origin'. The courts have construed the provisions in a conservative manner to the protection of the most important right of freedom of speech and expression and have found contravention of section 18C only in cases of what is called 'profound and serious effects', and not in cases involving 'mere slights'. That is quoting the current chief justice, Chief Justice Kiefel. We consider the exemptions in section 18D provide important and effective safeguards for justified freedom of expression consistently with such protections which exist elsewhere in the law.

I gather that the interest of the committee this morning is in the particular amendments to 18C, and we have previously noted that any amendment, let alone repeal, of any of the provisions of part IIA should be preceded by a rigorous and comprehensive review of their operation. In relation to the exposure draft of the Freedom of speech (Repeal of S. 18C) Bill 2014, we noted that we were not aware of any evidence that the existing provisions have had or have anything in the nature of a 'chilling effect' on the freedom of speech in Australia, and this remains the case.

In weighing the amendment to any of the language of the currently enacted text of sections 18C to D, the committee should also consider the impact of those provisions on the enjoyment of human rights, in terms of the promotion of, as well as interference in the enjoyment of, human rights. Do you want me to introduce our view about the current wording, or shall I leave it to the committee members to address questions to us on those proposed changes?

CHAIR: Ms McLeod, you might shorten the process if you just mention them before we ask the question, and then we might not have to ask the question.

Ms McLeod: Certainly. Having noted that we do not consider that the case for change has been made, if the parliament is minded to make amendments to sections 18C and D of the act, the current bill faces some problems in a number of respects. By omitting the words 'offend', 'insult' and 'humiliate' and replacing them with 'harass', there may be an assumption of a direct personal relationship. It may have the effect of carving out, for example, media or publications where the author has no particular person in mind to harass, and the ultimate effect may be to limit the scope of the provisions to interpersonal interaction.

It is actually a little unclear as to what meaning should be given to the term 'harass', in that, in state equal opportunity legislation for example, citing from the Western Australian act, 'racial harassment' can include threatening, abusing, insulting or taunting another person. So that is the statutory definition, and 'harass' is not otherwise defined in the proposed amendments that we are considering, but it may be that 'harass' covers some of the same conduct that it is intending to remove from 18C.

Other options have been put forward in terms of other language that could replace those words that they seek to remove, rather than 'harass'. Another option is that put forward by Justice Sackville, for example, who suggested the words 'to degrade, intimidate or incite hatred or contempt'—in other words, to use 'degrade' rather than 'humiliate'. Whatever words are ultimately adopted by parliament, they must be consistent with the prevention of harm and social cohesion, which are the objects of this act. The second point is to note that, in relation to the proposed standards of a reasonable member of the Australian community test, this is somewhat vague, as 'the Australian community' is a fluid and changeable concept.

Despite those difficulties with the bill, there are some improvements; for example, proposed subsection 18C2(b) clarifies the definition of an act, which is welcomed, to ensure the conduct can be resolved with a single unlawful act or a course of conduct, and that should be retained if parliament wishes to proceed with the bill. In respect of the tidying up of the complaints-handling process of the Australian Human Rights Commission, ensuring complaints are dealt with fairly and expeditiously, we support those changes, with some technical amendments that we would propose to those changes. We thank the committee for the opportunity to appear before you and we are happy to answer any questions as we may be able to do so.

CHAIR: Thank you very much, Ms McLeod. We appreciate that. Mr Moses or Dr Molt, do you have anything additional to add, particularly in relation to the bill?

Dr Molt: Not at this stage, thank you.

Mr Moses: No, thank you.

CHAIR: Thanks very much. In opening the questioning, I suggest that, if there are issues relating to the drafting of the bill—not the issue on yes or no to 18C, but on the actual technical amendments to the bill—if you do have suggestions that you have not been able to raise, could we get something in writing that may assist the department or the Attorney on the technical aspects of the bill.

Ms McLeod: We will be very happy to offer that assistance.

CHAIR: Thank you very much. Senator Dodson.

Senator DODSON: Do you believe three working days is sufficient consultation on this bill, given the complexity of the legal issues surrounding it?

Ms McLeod: The three-day timetable has not been sufficient for us to canvass with our members in any detail the proposed words and possible other words that might be substituted. We have been able to reach the view that we have expressed to you, but we have not otherwise canvassed the directors of the Law Council of Australia in terms of other alternative wording.

Senator DODSON: I heard your comments in relation to the purpose of the bill being social cohesion and protection from harm. Do you believe this bill will weaken or strengthen the protections against racial hate by permitting racial hate speech?

Ms McLeod: I note that the ALS submission agrees with President of the Australian Human Rights Commission Professor Triggs that, were section 18C to be limited in any way by parliament, this would send precisely the wrong message; that to weaken section 18C in any way would be a seriously retrograde step; and also that the legislation plays a powerful educative role and is capable of setting social standards. A concern has been expressed in the community—and I acknowledge this view—that, as to the winding back, if it is seen as a weakening of 18C rather than a strengthening or a substitution of words that do the same work, so if it is a weakening, then this is sending a signal that it is somehow acceptable to offend, insult or humiliate. Also there is a view that the winding back of these protections is inconsistent with the objects and purposes of the act and the overlying international instrument.

Senator DODSON: In relation to your comments about the lack of clarity around the term 'harassed' or 'harassment' or the various ways in which it is being interpreted under other legislation, do you believe that this is going to create more uncertainty for the courts if this change proceeds in the way it is drafted?

Mr Moses: The difficulty, I think, with the word 'harassment' is that it is circular and question-begging. There was an article in *The Spectator*, I think on 18 March, by Morgan Begg which noted that the wildcard was the insertion of the word 'harass' because there has not been a great deal of judicial interpretation of that word, and he referred to the decision of the High Court in Monis v The Queen in 2013; you might recall that that was the case involving the charge that the person had used the postal service to engage in menacing, harassing or making offensive statements to the families of returned service men and women, and Justice Hayne in that case said that 'harassing' meant 'troubling or vexing by repeated attacks'.

But the more problematic issue I think is this: the word 'harassment' is to be found in a number of pieces of legislation in the United States but also here in Australia, and, in the Sex Discrimination Act, it is defined, in terms of 'What is sexual harassment?', to include conduct that would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Hence, we could potentially see a reading back into the legislation of the very words that are said to be causing some difficulty at the moment.

I agree with our president, Fiona McLeod, about the timing issue. I have no doubt that, on both sides of the argument in this case, people are acting in good faith and have legitimate reasons to be putting their positions. There is no doubt about that. The issue is: when we come to change legislation, it would be best if we did it in a mature and considered fashion where these issues can be ventilated so that we can give our parliamentarians, who have the difficult job of resolving these issues, the best possible information and tools to ensure that legislation is amended in a way that does not have a consequence that is unintended, and, if the parliament saw fit, it would be best if we could have a bit more time to assist you to do your job in relation to this matter. But that is what I wish to say about the question of using that term 'harassment'.

Senator DODSON: This is in relation to item 4 of the draft bill which goes to section 18C subsection 2(a) where the standard now is being shifted to—and I presume you are all familiar with this—'a reasonable member of the Australian community'. Do you wish to comment on that?

Mr Moses: That issue is vexing. I have not seen that test deployed in any other piece of legislation, let alone deployed in the common law. The test, as we know, is 'reasonable person'. When you start using that type of language, it raises the question: what does that mean and in what context? What we may see is a shifting-sands approach to that phraseology by the judiciary because there would be no guidance as to what it is that we are talking about. That is a changing feast as to what represents the Australian community, because that is what makes this country great in terms of its diversity and ability to change and mould itself as the community changes. It is a problematic phrase from a legal point of view because we would be in uncharted waters. Again, I agree with our president that it is something that we would like to give you more assistance on so that there are no unintended consequences. The Australian community is something that is not, as we presently see it, defined in the legislation. That would create potential problematic issues for definitions, especially when we are trying to get certainty and not vagueness. So, if that is the aim of the legislation, that may create problems. That is all I wish to say. Thank you for your patience.

Ms McLeod: The use of the term 'Australian community' marks a departure from the assessment of the hurt from a member of the target group, if you like, to a reasonable member of an unidentified group or a cross-section or perhaps a selection of some type, which may or may not include that target group. As Mr Moses has indicated, there is an uncertainty around what that means and how courts are to interpret that, but it also represents a shift away from the objects of the convention, which are to prevent harm to the target group, if I can call them that, and to reflect on the need to protect them against racial discrimination that is targeting them by reference to the experience of that.

Senator McKIM: Good afternoon, everyone. Thank you for your time and for appearing at such short notice today. Firstly, taken as a whole—the changes that this legislation is proposing to section 18 of the Racial Discrimination Act—would you regard them as merely an attempt to codify the court's current interpretation or do you think they go further than that?

Ms McLeod: I offer this observation. If that is what is intended, then that has not successfully been achieved. For example, if the parliament were attempting to pick up the fact that these are contraventions with profound and serious effects, not cases involving mere slights, to use the language of the chief justice this year, that is not reflected in the words, or not clearly reflected in the words, that are now proposed.

Senator McKIM: Thank you. That is very clear and I appreciate that answer. I want to ask you another question about the proposed changes to section 18, taken as a whole, but I will caveat it by saying that I understand the difficulties in trying to predict how courts may interpret a new law. In your considered and expert legal judgement—and this is potentially to you, Ms McLeod, as well as to you, Mr Moses—would you say that, if the changes to section 18, taken as a whole, were to pass parliament, some cases of racism that currently offend section 18 would no longer offend that section?

Mr Moses: Going to that question relating to the use of the term 'harassment', if it were interpreted in the context of repeated conduct, as it were, then it may permit, as it were, one-off action, but that is not the more problematic issue. I think that the question of harassment involves some sort of temporal connection between the person making the statement and the victim of the statement. The way in which it has been dealt with, certainly in the sex discrimination cases, is, as it were, the relationship or the contact between two individuals.

So if we look at an example, such as the Toben v Jones case, involving anti-Semitic remarks, there might be a potential argument that a lawyer may run in that case that there is no harassment of an identified individual—in that case by an individual issuing pamphlets or making public pronouncements—because they are not directed towards one particular victim. That could be a potential argument that is run. I do not think that we as lawyers could discount that an outcome could be that in a case such as that involving Toben v Jones, that the person would otherwise not have been the subject of an adverse finding by the Federal Court. Hence, I think, the point that it would be of some benefit to everybody for us to look at this and provide you—that is, the legislators—with proper guidance and advice that could flow back through to the Attorney-General's Department to consider. As I said, everybody seems to be acting in good faith here; it is just a matter of ensuring that if we are going to do this then we do it properly and in a considered way, rather than having unintended consequences which nobody would envisage.

Senator SINGH: I have a follow-up question from Senator McKim's question, Mr Moses. I am trying to get a bit more clarity on that. Obviously, you had 18C being used in a series of cases to deal with holocaust denial statements, like by a woman called Olga Scully in Hobart. Is it the case then that if these provisions were to go through—the provisions we are debating currently—that that case, and the Fredrick Toben case, could now be held to be in contravention? They just seem to be fairly important cases to reflect upon—

Mr Moses: Of course. That would be the potential difficulty, I think, with the use of the term 'harass'. And this is just one view, there may be other views. But this is the difficulty in looking at it from a legal analysis view: if you are asking for a lawyer to express a view, there could be an argument run. I will just use an example, if I could: the decision of Justice Allsop in Toben v Jones from 2003. You might recall that in Toben he had published material on a website that raised a number of issues in relation to people of the Jewish faith and the Holocaust. He did not direct the statements towards a particular person, it was by way of published material. The troubling, or vexing, issue in respect of the use of the term 'harassment' is whether the courts would construe that word to mean that it must be similar to the Sex Discrimination Act—conduct that is directed by one person to a particular person. I think that is the issue of certainty or concern that I would raise.

But your question is right and valid in terms of the potential outcomes. That is my understanding of the issue—whether it is right or wrong would be a matter, ultimately, for a court to determine. That is a problematic issue for me as a lawyer looking at it and being asked the question about what potentially could occur with a case, with a changed legislative landscape.

Ms McLeod: Another case that would be worth considering in that context is the case of Clarke v Nationwide News, where comments attributed to the applicants were posted on a website. They were not particularly directed—there was not a personal relationship such as the word 'harass' might assume. That might be a case that would not be caught under the current proposal. We could certainly have a look at that for you.

CHAIR: Unfortunately, we will have to leave that there. In thanking Ms McLeod and Mr Moses for your evidence, can I particularly appreciate your very valuable legal advice that in other circumstances you might send us a big bill for. The committee has no money, so do not do that, but we do appreciate the benefit of very sound legal advice from senior counsel. Thank you very much for being with us.

Mr Moses: We are grateful for your time. Thank you.

Ms McLeod: Thank you to the committee.

CAMERON, Ms Laura, Policy Officer, Human Rights Unit, Attorney-General's Department

WALTER, Mr Andrew, Assistant Secretary, Civil Law Unit, Attorney-General's Department

[13:35'

CHAIR: We will call the department back, as we indicated, just in case any of the senators have issues they wish to raise. I might start with a general question. Is there anything in the evidence you have heard, issues that have been raised, that you think requires some response? Two of the witnesses haven't got it quite right, or—

Mr Walter: I think the very last point that was raised is quite an important one to think about. It is always difficult when you are looking at amending legislation. If we look at what the amendment will do, the provision will read—I will not read out the whole provision:

It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to harass or intimidate—

this is the important bit—

another person or a group of people …

So the provision as it stands already picks up, in terms of that proximity question, both individuals and a wider group, which could in this case be the Jewish people. We have case law that the Jewish people fall within that group, and Tobin is an example of that.

The other point that was raised by the Law Council was in relation to the definition of harass. To be very clear, we have not picked up the definition in the Sex Discrimination Act. That is a very specific definition, and indeed it will re-incorporate some of the terms that are already in 18C. We have not picked up that definition. The term harass is used in the Disability Discrimination Act without the qualifications that you find in the Sex Discrimination Act, so it is not intended to pick up that Sex Discrimination Act definition, which is context specific. The point was made also—

CHAIR: Does that need to be made clear in the second reading speech, the explanatory memorandum or the bill itself?

Mr Walter: That is something we can certainly look at clarifying. Probably in the explanatory materials rather than—

CHAIR: Which then can be used by courts as an aid to interpretation.

Mr Walter: Yes, that is right.

Senator McKIM: Does that pick up the repetition issue?

Mr Walter: Sorry, I was just going to get to the repetition issue.

Senator McKIM: Okay, thank you.

Mr Walter: In item 4 of schedule 1 you will see proposed subsection (2B). That deals with the repetition issue. That says:

(2B) For the purposes of subsection (1), an act may be:

(a) a single isolated act; or

(b) one of a series of acts; or

(c) one of a group of related acts.

So it is meant to capture a one-off event or the normal kind of understanding of harassment as a course of conduct.

Senator McKIM: Mr Walter, I want to take you back to something I understood you said earlier this morning. If I have you wrong, please correct me. Did you give evidence that it is your view that the changes to 18C, taken as a whole, merely codify the courts' existing interpretation?

Mr Walter: Codification I do not think is the right word. They are meant to reflect the fact that over time the courts have interpreted these provisions and moved away from what you might consider the ordinary language in those provisions. This is intended to have language that reflects that different understanding of the provisions. I do not think codification is a useful term in this context. If we codified, it would be pages and pages.

Senator McKIM: In fact, you might just take Kiefel's words from the *Cairns Post* case, for example, if you really wanted to codify, which clearly is not the intent of this legislation. If we get away from semantics—you have used the word reflect instead of codify—it is very difficult to make a prediction about how a court is going to interpret any new piece of legislation until you start to get some of the case law coming through the system. I

understand that. Accepting that, is it the department's view that, taken as a whole, these proposed changes to 18C—so that is the change to the wording and the insertion of the reasonable person test; that is what I mean by taken as a whole—these changes are merely a reflection, to use your word, of the case law as it currently stands?

Mr Walter: Leaving aside that the case law is a little disparate, yes. The provisions are intended to reflect what has happened in the case law, of which there is a reasonable volume now. The other point that might be worth making, and it is one that the Attorney-General has made, is that we have had a lot of discussion about what might not be captured that is currently captured. I have not yet heard examples that have been given that we would not have thought would have been captured by the provision as amended. We have not really seen any examples yet—for example, the types of egregious behaviour that were raised by FECCA in their opening statement—we cannot see how that would not be picked up by the provision as amended.

Senator McKIM: I think their point was the message that is being sent rather than the case law, and I personally think that entirely valid point.

Mr Walter: I understand that point, but as I said, we cannot see how those would not already be picked up by the provision as amended.

Senator McKIM: I am very happy for this to be the last matter I raise. Thank you for that. Given that you have said that you think the changes to section 18, taken as a whole, are a reflection of current case law—I hope I have not mis-paraphrased you there, but that is my understanding of what you have said—did the department seek legal advice from anyone on this, perhaps the Australian Government Solicitor, or—

Mr Walter: Legal advice was sought throughout the process, yes.

Senator McKIM: Yes, but its specifically go to that question?

Mr Walter: To whether—

Senator McKIM: To where this legislation sets the bar in relation to where the bar has been set by the courts.

Mr Walter: We did seek advice in relation to the test—the 'harass'.

Senator McKIM: Yes, but my question is specifically, 'taken as a whole'—

Mr Walter: To say, does this equal that?

Senator McKIM: Yes.

Mr Walter: No.

Senator McKIM: So on what basis do you make that claim, then? Are you a lawyer? I am sorry, I do not know your background.

Mr Walter: I am, yes.

Senator McKIM: You are? Do you have expertise in anti-discrimination matters and racial discrimination matters?

Mr Walter: The unit I run is responsible for domestic human rights law and legislation.

Senator McKIM: Thank you. And it is your considered view that, even though you did not seek specific external advice, taken as a whole—so that is the changes to 18C plus the reasonable person test that this legislation wants to insert—all the effect will be is to reflect current case law and the way the courts have currently interpreted 18C? Just to be clear, we have had very strong evidence this morning that that is not the case.

CHAIR: This is asking for a view, an opinion and legal advice.

Mr Walter: I am sorry, I cannot give you advice on that, but we went through this this morning—the process by which the term 'harassment' was settled on in terms of the history of that term in this context, the committee's consideration of it and submissions considered by the PJCHR. So there is that history that goes along with—

Senator McKIM: Yes, I am on that committee, so—

Senator DODSON: I am wondering about the comments we have heard in relation to the shift in the standard upon which the discrimination will be based in terms of the reasonable Australian community. Does that cause you any concerns or—

Mr Walter: I suppose the comment that we might make to that is that the reasonable person test, obviously, has a very long history in law. The famous, if you like, characterisation of that test is—and I will put emphasis on this—'the man on the Clapham omnibus'. It comes from English law, obviously. I say the—

Senator DODSON: Sorry to interrupt, because I know we are over time. The question that seems to be ignored here is the people—out of which cultural bloc that they come is now being obfuscated or put to one side under the new concept of the Australian community. That is the point here.

Mr Walter: Yes, the test will move away from one which requires the reasonable person to be drawn from the group from which the complainant comes to a different group, that group being the Australian community as a whole. I think that probably aligns it more closely with what you would find is the normal reasonable person test, noting the Law Council's comments on that. In practice, I do not think there is a huge difference, but I think there could in some cases be a real difference in the application of those two tests. Where that would most likely play out is in relation to some proclivities or vulnerabilities of groups that might not be commonly known to people rather than in the type of scenarios that have been raised today. I do not think the test would make any realistic difference to those. It might in very obscure cases, though.

CHAIR: Mr Walter and Ms Cameron, thanks very much for staying around all morning. It has been very helpful to the committee.

Committee adjourned at 12:46