SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: Australian Human Rights Commission

Question No. SBE16/043

Senator Macdonald asked the following question at the hearing on 18 October 2016:

CHAIR: And the Human Rights Commission has no involvement one way or another in relation to that. I appreciate that it is before the court, and it may curtail what you are able to tell me. But I was hoping that you could explain this to me. As I understand it—and I may be wrong, and you should correct me if I am wrong—students posted content on Facebook, including the words 'Just got kicked out of an unassigned Indigenous computer room. QUT stopping segregation with segregation'. There may have been other words, but I am not aware of them. Can you explain to me and to most Australians how that can possibly be the basis of a complaint under 18C or any other act or principle of the federal government?

Prof. Triggs: Senator Macdonald, I think as you are well aware, I cannot comment upon the facts or allegations of that case. But what I can do is to repeat what I think I have said now several times over the last seven hours. Under the statute of the Human Rights Commission I am legally bound to accept any written statement alleging a breach of human rights or antidiscrimination law. When that allegation is made in any legal form—a letter—I and the staff of the commission must proceed to investigate the matter and to seek a conciliation. We do that in all matters where we can proceed to conciliation.

CHAIR: Did I hear you say to Senator Fawcett that there were certain exceptions if you decided the complaint was frivolous—I think you named a number of others, but I wrote down 'frivolous'—and that there were a certain number of cases where, as I understand it, the commission would look at it initially and say, 'There's nothing in this; go away.' Is that right? Do you have that ability?

Prof. Triggs: We do. I can decide, ultimately—or through a delegate—that a matter is vexatious, frivolous or not within jurisdiction or that the facts do not measure up. Another context in which it can happen is that one of the parties withdraws. Quite often what happens is that they will begin something with a letter to us, we start an investigation and then the parties will withdraw. That is a determination, if you like, that I can make where the evidence seems to me to justify a termination on those grounds.

The difficulty, in many cases, is that as a practical matter the threshold for the issue is extremely low. I have asked, on a number of occasions, for that threshold to be lifted, but it has not occurred. Senator Fawcett has raised these points. They are absolutely valid points to be made and discussed, but this is a job for parliament. My job is to apply the law as it currently exists, and that is of a very low threshold. That is why, in honesty, the public could be a little concerned about why some matters are being considered by us when they might say, on what they know from often distorted media stories, that they would not see a justification for the matter. But I cannot defend that in the media. I cannot speak up, because they are confidential and I have to honour the processes that we have within the commission.

…

CHAIR: Thanks, Senator Brandis, but you interfered with my train. Professor Triggs, you have indicated you have made submissions—I assume to the Attorney or to the government or someone—to raise the standard. Apart from the record of this hearing, is there anywhere the committee could get the—this is an unparliamentary word—guts of your submission? The committee, should it choose, might be interested in helping you in your approach to the government. The Attorney seems to agree with it in any case, but perhaps the committee could

add its voice to yours in the hope that the government, and ultimately the parliament, might do something about the issue.

Prof. Triggs: I think that would be very helpful. Obviously I will take that on notice to give you the initiatives that we have taken in the past and discussions with the respective attorneys, if I may say so. I think this discussion has been a very helpful one, because it has—at least in this arena—explained why we appear to be dealing with matters that some people would say should not be before the commission. That is something that should be properly discussed, in an informed and courteous way, and I think it is at least open to a suggestion for reform.

There are difficulties, in the sense that not many matters are actually vexatious or frivolous, and we have to look at them seriously. That is going to take a little bit of time, but I will certainly take back to my office, if I may, Senator Fawcett's concerns about the time it might take to get to some of these questions—although I should repeat that one of the difficulties is that we receive 20,000 a year, and very, very few find their way into the media. This is a huge burden on the staff of the commission.

…

CHAIR: I accept that, and thank you for that.

The answer to the honourable senator’s question is as follows:

The Commission has proposed potential reforms to the complaint handling process in correspondence and conversations with the Attorney-General and the Attorney-General’s Department since 2014.

The Commission also proposed a range of amendments during the consolidation of discrimination laws process under the previous Government.

The following text regarding technical amendments was provided to the government in 2015 and 2016.

Technical fixes to aid the smooth operation of the Commission’s jurisdiction

There are a number of modest, technical legislative amendments that would improve efficiency and reduce regulatory burden in how the Commission exercises its existing jurisdiction, as follows:

- **Amend definition of what can constitute a complaint** - Reduce potential for unmeritorious complaints by including new provision which makes it clear that for complaint to be accepted by the Commission a person must allege an act which, if true/proven, could constitute a breach of federal human rights and anti-discrimination law. This differs from current wording which requires the person to allege it is unlawful discrimination – that is, it doesn’t have to be something which *could* amount to unlawful discrimination, they just have to allege that it is.

- **New ground for the Commission to close human rights complaints where no further action warranted** - The Commission could be empowered to take no further action on human rights complaints (under section 20 and section 31 of the AHRC Act) where there is no reasonable prospect that the complaint will be settled by conciliation and where it considers that no further action is warranted. This would allow the Commission to expeditiously dispose of human rights complaints that are ill conceived or vexatious.

- **Discretion for the Commission not to produce a report to the Minister in relation to human rights complaints** - Currently, the AHRC Act requires (sections 20 and 31) that

the Commission give a report to the Minister in relation to a human rights inquiry (whether conducted because of a complaint or on the Commissions initiative) in situations where the Commission finds that the act or practice is inconsistent with human rights, and attempting to settle the matters is not appropriate or unsuccessful. Once a report has been provided to the Minister, it must be tabled in Parliament.

The Commission could be provided with a broad discretion as to whether to provide a report to the Minister. It is envisaged that these provisions would reduce the Government's administrative burden related to Parliamentary tabling of human rights reports that have not found significant human rights breaches, as well as the administrative burden on the Commission of producing reports on own-motion inquiries where investigation has not disclosed major issues. This would make the complainants and respondents the principal recipients of the report, with the Minister (and thereby Parliament) kept informed of major issues at the Commission's discretion. This would strikes a balance between keeping the Minister informed of significant issues and ensuring that the Minister and Parliament's time is not taken up with reports that do not identify significant issues.