

ACTION ALERT 17-1: FREEDOM OF SPEECH

As Quakers, we seek a world without war. We seek a sustainable and just community. We have a vision of an Australia that upholds

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The Joint Parliamentary Committee on Human Rights has recently issued its report on an Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 and related procedures under the Australian Human Rights Act 1986. The briefing paper summarises the main findings and suggests possible action to follow up the report. The full report is available at

www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/Freddo_mspoeechAustralia/Report

Possible Action

Quakers may wish to take up with their own Federal MPs and Senators the ongoing concern to ensure that the legislation remains in place, and that the recommended changes to procedures be implemented so as to reduce the basis for further challenges to the whole process.

Background

In 1975 the Racial Discrimination Act was passed by Federal Parliament to implement within Australia the obligations ratified under the International Convention on the Elimination of All Forms of Racial Discrimination. In 1995 Parliament added (with support from all parties) a Section 18C which refers to offensive behaviour because of race, colour or national or ethnic origin. It makes it unlawful to engage in behaviour that is likely to offend, insult, humiliate or intimidate another person or group.

Freedom of speech is protected under Section 18D. 18C does not render unlawful anything said or done reasonably or in good faith, in the performance, exhibition or distribution of an artistic work; in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose of any other genuine purpose in the public interest; or in making or publishing a fair and accurate report of any event or matter of public interest, fair comment on any event or matter of public interest, if the comment expresses a genuine belief.

The Inquiry

On 8 November 2016 the Federal Attorney-General referred to the Joint Parliamentary Committee on Human Rights a question about whether the operation of Part IIA of the Racial Discrimination Act “imposes unreasonable restrictions upon freedom of speech” and in particular whether Sections 18C and 18D should be reformed. In addition, the committee was asked to investigate whether the handling of complaints made to the Australian Human Rights Commission (AHRC) should be reformed “in relation to trivial or vexatious complaints or complaints that have no reasonable prospect of success”.

The Committee received over 400 submissions and many form letters and items of correspondence. Nine public hearings were held, covering all capital cities. The Chair of the Committee (ALP Qld). The report made the following overall comment (para 2.136):

The committee is cognisant of the evidence presented to it that even changes that could improve understanding of the existing law risk being taken as an indication that racism is acceptable to the Parliament. In canvassing possible amendments to Part IIA, the committee does not intend to signal acceptance of any licence for racism in Australia. The committee considers that should any amendments to Part IIA of the RDA proceed they should be accompanied by education programs to ensure that such amendments are properly understood— both by the Australian community at large and by those communities that are particularly affected—as a strong endorsement of the value of protections for serious forms of racially hateful or discriminatory speech.

The report represents an example of careful balancing of views and analysis of the cases for and against changes in the Act and procedures. The following points emerged:

- Those wanting changes in the Act identified confusion about the scope of 18C and 18D as a major concern and threat to freedom of speech.
- Those resisting changes in the Act saw the Act as protecting multicultural principles against racist speech, and saw any change as weakening that.
- Legal interpretations of the Act have emphasized that section 18C applies only to conduct that has profound and serious effects, and appear to be sufficiently objective to avoid frivolous complaints being upheld.
- Many stories of racist behavior were heard, indicating the adverse impact on mental and physical health, on self-esteem, and on the willingness to speak out against discrimination.
- There is a perception that complaints are too easy to make, causing waste of time and resources and raising inappropriate expectations of redress.
- Conciliation processes used by the Human Rights Commission can lead to an apology, a withdrawal of offensive material, a change in policies or training, or financial compensation.

Additional comments included in the Report - from the ALP members and the Greens - indicated strong support for retaining 18C and 18D as at present, seeing any change as likely to lead to a weakening of national commitment to counteract racism. The report drew attention to the value of a separate Inquiry into “which laws may unjustifiably impinge on freedom of speech”.

Recommendations

The Committee made 22 recommendations covering the Act, the procedures and education. Here is a summary:

- Recommendations 1 and 2 urge better education programs about the RDA, and more speaking out by leaders against discriminatory speech.
- Recommendation 3 identifies possible changes to 18C and 18D as well as objections to any changes.
- Recommendation 4 seeks to make the Joint Committee have regular oversight meetings with the Human Rights Commission.
- Recommendations 5 to 7 offer suggestions for amending the Human Rights Commission legislation to make the procedures for handling complaints more timely, fair, transparent and effective.
- Recommendation 8 suggests time limits for the handling stages.
- Recommendations 9 to 16 cover ways in which the procedures can be tightened to reduce the chance of frivolous or inappropriate complaints.
- Recommendation 17 seeks appointment of a judge to the AHRC to provide assistance in the handling of complaints.
- Recommendations 18 to 21 apply more stringent conditions to matters going from AHRC to the Federal Court.
- Recommendation 22 asks AHRC to make more explicit the roles of different officials in the handling of cases.

The full list of recommendations is included in the Appendix.

Comment

The Quaker submission to the Inquiry made the following points:

- We see Section 18C of the Racial Discrimination Act 1975 as protecting the most vulnerable and marginalized members of our Australian community.
- We consider that the process by which the Australian Human Rights Commission (AHRC) responds to complaints under Section 18C is working well, in that most cases are resolved through conciliation, and few reach the courts.
- In our view, the existing law is effective and strikes an appropriate balance between protecting minorities and preserving freedom of expression in our multicultural community.

The Joint Committee has clearly been influenced by the substantial evidence from many quarters about the importance of the current legislation in protecting minorities and diversity. At the same time, it has seen ways in which the processes could be improved, and most of its recommendations in that regard are consistent with what the Human Rights Commission itself has been seeking.

The Government may still be inclined to work for changes to the Act, given the strength of views of some of its members and constituents.

Quakers may wish to take up with their own Federal MPs and Senators the ongoing concern to ensure that the legislation remains in place, and that the recommended changes to procedures be implemented so as to reduce the basis for further challenges to the whole process.

APPENDIX: RECOMMENDATIONS OF REPORT

1. The committee recommends further supporting, strengthening and developing education programs including those:

- addressing racism in Australian society;
- addressing the scope of conduct caught by Part IIA of the *Racial Discrimination Act 1975* as judicially interpreted; and
- about the meaning and scope of any amendments to Part IIA of the *Racial Discrimination Act 1975*.

2. Recognising the profound impacts of serious forms of racism, the committee recommends that leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public.

3. The committee received evidence about a number of proposals in relation to Part IIA of the *Racial Discrimination Act 1975*.

Given the nature and importance of the matters considered by the committee for this inquiry – primarily the right to freedom of speech, the right to be free from serious forms of racially discriminatory speech, and the importance of the rule of law – views varied among members of the committee as to how to balance these appropriately. The range of proposals that had the support of at least one member of the committee included:

(a) no change to sections 18C or 18D;

(b) amending Part IIA of the *Racial Discrimination Act 1975* to address rule of law concerns and to ensure that the effect of Part IIA is clear and accessible on its face, by codifying the judicial interpretation of the section along the lines of the test applied by Kiefel J in *Creek v Cairns Post Pty Ltd* that section 18C refers to 'profound and serious effects not to be likened to mere slights';

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

(d) amending section 18D to also include a 'truth' defence similar to that of defamation law alongside the existing 18D exemptions;

(e) changing the objective test from 'reasonable member of the relevant group' to 'the reasonable member of the Australian community'; and

(f) criminal provisions on incitement to racially motivated violence be further investigated on the basis that such laws have proved ineffective at the State and Commonwealth level in bringing successful prosecutions against those seeking to incite violence against a person on the basis of their race.

4. The committee recommends that the Parliamentary Joint Committee on Human Rights become an oversight committee of the Australian Human Rights Commission with bi-annual meetings in public session to discuss the Commission's activities. These sessions will examine the Commission's activities, including complaints handling, over the preceding six month period.

5. The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide that when there is more than one respondent to a complaint, the Australian Human Rights Commission must use its best endeavours to notify, or ensure and confirm the notification of, each of the respondents to the complaint at or around the same time.

6. The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide that the principles applicable to inquiries conducted pursuant to sections 11(1)(aa), 20(1)(b) and 32(1)(b) of the *Australian Human Rights Commission Act 1986* are that:

(a) dispute resolution should be provided as early as possible; and

(b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and

(c) the dispute resolution process is fair to all parties; and

(d) dispute resolution should be consistent with the objectives of the *Australian Human Rights Commission Act 1986*.

7. The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to empower the Australian Human Rights Commission to offer reasonable assistance to respondents consistent with assistance offered to complainants.

8. The committee recommends that the Australian Human Rights Commission adopt time limits for processes related to complaint handling activities. These time limits should apply, but not be limited to, the following stages:

- initial assessment of complaint (including provision within this timeframe to dismiss unsubstantiated claims);
- notification to respondents;
- investigation of complaint; and
- conciliation of complaint.

It may also be necessary to design some flexibility in relation to the time limits.

9. The committee recommends that section 46P of the *Australian Human Rights Commission Act 1986* be amended with the following effect:

- complaints lodged be required to 'allege an act which, if true, could constitute unlawful discrimination';
- a written complaint be required 'to set out details of the alleged unlawful discrimination' sufficiently to demonstrate an alleged contravention of the relevant act; and
- a refundable fee be lodged with the Human Rights Commission prior to consideration of a complaint (with consideration given to waiver arrangements similar to those that are in place for courts).

10. The committee recommends that legal practitioners representing complainants be required to certify that the complaint has reasonable prospects of success.

11. The committee recommends that, where the conduct of the complainant or practitioner has been unreasonable in the circumstances, the Australian Human Rights Commission be empowered to make orders, on a discretionary basis, about reasonable costs against practitioners and complainants in order to prevent frivolous claims.

12. The committee recommends that the grounds for termination in section 46PH(1) of the *Australian Human Rights Commission Act 1986* be expanded to include a power to terminate where, having regard to all the circumstances of the case, the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted.

13. The committee recommends that the President's discretionary power under section 46PH of the *Australian Human Rights Commission Act 1986* to terminate complaints be amended so that the President has an obligation to terminate a complaint if the President is satisfied that it meets the criteria under section 46PH.

14. The committee recommends that section 46PH(1)(a) of the *Australian Human Rights Commission Act 1986* be amended to clarify that the President must consider the application of the exemptions in section 18D to the conduct complained of when determining whether a complaint amounts to unlawful discrimination.

15. The committee recommends that section 46PH of the *Australian Human Rights Commission Act 1986* be amended to include a complaint termination criterion of 'no reasonable prospects of success'.

16. The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide for a process whereby a respondent to a complaint can apply to the President for that complaint to be terminated under section 46PH of the *Australian Human Rights Commission Act 1986*.

17. The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide for the appointment of a judge as a part-time judicial member of the Australian Human Rights Commission. The judicial member could perform the President's functions in dealing with initial complaints under Part IIA of the *Racial Discrimination Act 1975*.

18. The committee recommends that section 46PO of the *Australian Human Rights Commission Act 1986* be amended to require that if the President terminates a complaint on any ground set out in section 46PH(1)(a) to (g), then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave.

This amendment should include that:

- the onus for seeking leave rests with the applicant; and
- the Australian Human Rights Commission provide to the Federal Court or Federal Circuit Court a certificate detailing its procedures and reasons for termination of the complaint as part of the process of seeking leave.

19. The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to make explicit that, subject to the court's discretion, an applicant pay a respondent's costs of future proceedings if they are unsuccessful or if the respondent has, at any earlier point, offered a remedy which is at least equivalent to the remedy which is ultimately ordered.

20. The committee recommends that consideration be given to whether a complainant's solicitor should be required to pay a respondent's costs where they represented a complainant in an unlawful discrimination matter before the Federal Circuit Court or Federal Court and the complaint had no reasonable prospects of success.

21. The committee recommends that a plaintiff/complainant, following the termination of a complaint by the Australian Human Rights Commission, who makes an application to the Federal Court or Federal Circuit Court under section 46PO of the *Australian Human Rights Commission Act 1986*, in relation to a complaint that in whole or in part involves Part IIA of the *Racial Discrimination Act 1975*, be required to provide security for costs subject to the court's discretion.

22. The committee recommends that the Australian Human Rights Commission should issue guidelines outlining the distinct roles of the President and the relevant Commissioners in relation to complaint handling and public comment and act to ensure that perceptions of complaint soliciting are not able to be drawn from the behaviour of the Commission, its Commissioners or its officers.