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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, Senator the Honourable George Brandis QC)

HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2017

GENERAL OUTLINE

Purpose and objective

1. The Human Rights Legislation Amendment Bill 2017 (the Bill) 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.
2. 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.
3. 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, 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 ‘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.
4. . The law should provide protection from racial vilification. It should do so in a manner which is consistent with Australia’s obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD). 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.
5. 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.

7. Importantly, the reformulation of the section 18C proscription is consistent with Australia's international obligations under the CERD.
8. The Bill will amend the AHRC Act to ensure that the Commission's processes are fair to all the parties, and unmeritorious complaints cannot proceed to the courts.
9. Resolving complaints of unlawful discrimination is one of the Commission's most important roles. 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.
10. However, the Commission's model needs to be improved to ensure that people against whom complaints are made are treated fairly and that inappropriate claims are identified and eliminated at the threshold. The amendments in this Bill will rectify these irregularities.
11. 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.
12. 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.
13. The Bill will also amend the AHRC Act in line with recommendations made by the Commission itself. These will have the effect of reducing its regulatory and administrative burden, reforming reporting requirements and clarifying the Commission's conciliation process and governance arrangements.
14. The amendments in this Bill will restore public confidence in the Commission's processes, and thereby in the Commission itself. They will bring certainty to complainants and respondents to complaints of unlawful discrimination, and ensure that all parties to a complaint are accorded procedural fairness.

Background

Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech in Australia

15. On 8 November 2016, the Attorney-General asked the PJCHR to inquire into and report on two issues relating to freedom of speech in Australia.
16. This reference was made in response to growing public concern about the effect of section 18C of the RDA upon freedom of speech, and the complaints handling procedures of the Commission. This concern arose following a number of high-profile cases under section 18C, including those arising from complaints against the broadcaster Andrew Bolt, the late cartoonist Bill Leak, and students at the Queensland University of Technology.

17. Additionally, in its Report into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, also known as the ‘Freedoms Inquiry’, the Australian Law Reform Commission (the ALRC) identified that Part IIA of the RDA ‘would benefit from more thorough review in relation to freedom of speech.’ Although the ALRC identified section 18C as an area of concern, it did not establish whether section 18C has, in practice, caused unjustifiable interferences with freedom of speech.

18. The PJCHR’s report was tabled on 28 February 2017. The report was the result of extensive public consultation, including consideration of approximately 11,460 items (submissions, form letters and other pieces of correspondence) as well as nine public hearings held in the capital city of each state and territory.

19. The majority report made 22 recommendations, 18 of which relate to the Commission’s complaints handling process. The report acknowledged the need to reform aspects of the Commission’s complaints handling processes, noting community concern about the Commission’s ability to appropriately address unmeritorious complaints. The report also reflected a view that the complaints handling process is currently weighted in favour of complainants.

20. The PJCHR did not reach a consensus view on reform of section 18C. Instead, it put a number of proposals to Government. The Committee was of the view that Part IIA of the RDA (which includes section 18C) is considered an important protection against forms of racially discriminatory speech and racism in Australia. However, it also recognised the fundamental importance of freedom of speech and the need for open public dialogue on serious and difficult questions, including matters of race.

21. The amendments made by this Bill will implement recommendations 3(c), 3(e), 5, 6, 7, 8, 9, 12, 13, 14, 15, 18, and 19 of the PJCHR report.

Outline of the Bill

Schedule 1 – Amendments to the Racial Discrimination Act 1975

22. The RDA was the first piece of Commonwealth anti-discrimination legislation. It implements Australia’s obligations under the CERD, which Australia ratified in 1975. The RDA prohibits discrimination on the basis of race, colour or national or ethnic origin in all areas of public life and provides civil remedies where such a contravention occurs.

23. Part IIA of the RDA was introduced by the *Racial Hatred Act 1995*. Part IIA includes section 18C, which makes it unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people. The act must be done because of the race, colour or national or ethnic origin of the person or group. Section 18D provides a number of exemptions to section 18C, including for acts done in the performance, exhibition or distribution of an artistic work, fair and accurate reporting or acts done in the course of any genuine academic, artistic or scientific purpose or any other purpose in the public interest.

Harass or intimidate

24. Item 3 of the Bill will replace the words ‘offend’, ‘insult’ and ‘humiliate’ with ‘harass’, while retaining the word ‘intimidate’. The formulation ‘harass or intimidate’ more

accurately describes the core vice of racial vilification than the existing formulation, without subjecting frank and open discussion and debate, however challenging to legal sanctions and therefore prejudicing freedom of speech.

25. The inclusion of the term ‘harass’ will reflect the original recommendations of the National Inquiry into Racist Violence by the then Human Rights and Equal Opportunity Commission, which was a basis for the introduction of the *Racial Hatred Act*. The National Inquiry specifically recommended that the RDA be amended to ‘prohibit racist harassment.’ The Report found that ‘it is desirable that there is a clear statement of the unlawfulness of conduct which is so abusive, threatening or intimidatory as to constitute harassment on the ground of race, colour, descent or national or ethnic origin.’ The amendment thereby captures the original policy intent of section 18C.

26. This item will implement Recommendation 3(c) of the PJCHR Report.

The reasonable member of the Australian community

27. Item 4 of the Bill will ensure that alleged contraventions of section 18C are assessed against objective Australian community standards. The amendments made by Item 4 will clarify that an assessment of whether an act is reasonably likely to harass or intimidate a person or group of persons should be made against the standard of a reasonable member of the Australian community, rather than a reasonable member of the targeted group. This will ensure that the subjective sensitivities of particular groups do not make unlawful certain conduct which a reasonable member of the Australian community would not judge to constitute harassment or intimidation. .

28. This item will implement Recommendation 3(e) of the PJCHR Report.

Schedules 2 and 3 - Amendments to the Australian Human Rights Commission Act 1986 and the Native Title Act 1993

Amendments in response to the PJCHR Report

29. The following amendments in the Bill will respond to the recommendations of the PJCHR as listed below.

30. ***Principles for dispute resolution and timeframes for resolution of complaints*** – Items 10, 15 and 36 will introduce principles applicable to the Commission’s complaints and inquiry procedures. These amendments will implement PJCHR recommendations 6, 7 and 8.

31. While the majority of the Commission’s complaints are finalised within six months of lodgement, the PJCHR heard evidence detailing examples of lengthy complaints processes and delays.

32. Items 10 and 15 will introduce requirements for the Commission to act fairly and expeditiously in relation to its human rights inquiry and equal opportunity in employment inquiry functions. Item 36 will introduce requirements for the Commission to act fairly and expeditiously in relation to its unlawful discrimination functions, which includes complaints made under the RDA, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.

33. These amendments will oblige the President to act fairly, including towards complainants and respondents, in the course of inquiring into and attempting to conciliate a complaint. The requirement to act fairly includes offering reasonable assistance to complainants and respondents. An example of such assistance would be helping a person with disability to transcribe information. It is not intended to extend to the provision of legal advice. Although principles of natural justice and procedural fairness already apply to the President's handling of complaints at all stages, the amendments make the President's obligation to act fairly to all parties clear on the face of the AHRC Act.

34. The amendments will also oblige the President or the Commission to act expeditiously when dealing with complaints, and to use best endeavours to finish dealing with complaints within 12 months.

35. Nevertheless, these amendments will provide a clear legislative imperative to continue to ensure that complaints are finalised quickly, and to avoid protracted processes for complainants and respondents.

36. **Notification of respondents** – Item 36 will introduce mandatory requirements for the President to notify respondents to a complaint. This amendment will implement PJCHR recommendation 5.

37. The AHRC Act currently has no legislative requirement that the respondents to a complaint be notified until the conciliation conference stage, and only then in relation to compulsory complaints. Although the Commission as a matter of practice will notify the respondents to a complaint, the case of *Prior v Queensland University of Technology* [2016] FCCA 2853 ('QUT') and evidence before the PJCHR inquiry highlighted community concern that respondents are not always promptly notified of the existence of a complaint.

38. The amendments will introduce a duty for the President to notify any respondents to a complaint, including where respondents are added at a later stage through amendment of a complaint, and any person (other than the respondent) who is the subject of an adverse allegation in the complaint. These duties are mandatory except where the President is satisfied that notification would prejudice the safety of a person. Where there is more than one respondent to the complaint, such as in QUT, these provisions will ensure that multiple respondents to a complaint are notified, to the extent possible, at the same time (except in the limited circumstance in which to do so would prejudice the safety of a person). Instances of prejudice to a person's safety may arise in, for example, cases of sexual harassment.

39. The amendments will also introduce new discretion for the President to notify persons about a complaint who are likely to be able to provide information relevant to the complaint. This will allow the President, where appropriate, to notify people against whom specific allegations are not made but they may be intimately connected to the subject matter.

40. These amendments will ensure that respondents are notified in a timely manner so that they have a fair opportunity to respond to allegations made against them.

41. **Threshold for lodging a complaint** – Items 1, 2, 27, 28, 32, 33, 35, 38 and 40 will raise the threshold for the lodgement of a valid unlawful discrimination complaint to the Commission. These amendments will implement the majority of PJCHR recommendation 9.

42. The AHRC Act set a low threshold for the lodgement of a complaint. A bare allegation that unlawful discrimination has occurred—even if it does not contain any particulars of alleged conduct—is sufficient to meet the threshold for lodging a complaint. The PJCHR accepted concerns expressed by submitters and witnesses to the inquiry that the current low threshold encourages lodgement of complaints that are ultimately deemed to be trivial, vexatious, misconceived or lacking in substance.

43. These amendments will raise the threshold for a complaint by requiring that the complaint allege that certain conduct, alleged to be unlawful discrimination, has occurred. The new provision will require that it must be ‘reasonably arguable’ that the alleged conduct constitutes unlawful discrimination, and will require a complaint to set out details of the alleged conduct. These requirements will ensure that complaints contain more than bare allegations and sufficiently substantiate why alleged conduct constitutes unlawful discrimination.

44. The higher threshold will enhance the Commission’s ability to make an initial assessment and dismiss complaints that are unmeritorious upon lodgement. This will assist to avoid potentially protracted complaints processes.

45. Processing unmeritorious complaints is an inefficient use of the time and resources of the complainant, respondent, Commission, and in some cases, the courts. The amendments will enable the Commission to operate more efficiently and reduce the regulatory burden of the AHRC Act.

46. ***Termination of complaints*** –Items 29, 30, 31, 34, 37, 39, 41–46, 48, 52, 55 and 56 will provide greater ability for the Commission to terminate unmeritorious complaints. These amendments will implement PJCHR recommendations 12 to 16.

47. During its inquiry, the PJCHR heard evidence about the operation of the President’s power to terminate complaints, including a perceived reluctance to use these powers in circumstances where they may be warranted.

48. The Bill introduces three new grounds (one discretionary and two mandatory) on which a complaint could be terminated by the President:

1. the President is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted (discretionary)
2. the President is satisfied the complaint is trivial, vexatious, misconceived, or lacking in substance; or there is no reasonable prospect that the complaint will be resolved in favour of the complainant or complainants (mandatory), and
3. the President is satisfied there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination (mandatory).

49. When a complaint is referred to the President, he or she will also be required to consider whether to terminate the complaint, having regard to the grounds of termination, before starting to inquire into the complaint.

50. The mandatory grounds of termination will target unmeritorious complaints. They will oblige the President to terminate such complaints at an early stage, and provide a greater disincentive to lodge frivolous complaints. Mandatory termination of such complaints will reduce, in some cases significantly, the burden on potential respondents.

51. The Bill will also insert a note to clarify that the President is to consider the exemptions to unlawful discrimination in deciding whether to terminate a complaint. Accordingly, the President must, in considering whether a complaint constitutes unlawful discrimination under section 18C, consider the exemptions in section 18D.

52. ***Leave of the Court*** – Item 53 will introduce a requirement that leave of the Federal Court or Federal Circuit Court be granted to make applications alleging unlawful discrimination which were the subject of complaints terminated by the President. The only exception this requirement will be where the President terminated the complaint because he or she was satisfied that the subject matter of the complaint involves a significant issue of public importance that should be considered by the Federal Court or Federal Circuit Court. This amendment will implement PJCHR recommendation 18.

53. There is currently no substantive barrier to a person whose complaint has been terminated on the basis that it is trivial, vexatious, misconceived or lacking in substance from making an application to the court. Even if the court ultimately decides to dismiss the matter, the respondent is nonetheless exposed to potentially significant costs in defending an unmeritorious complaint. It also wastes the limited resources of the court.

54. In seeking leave of the court, an applicant will be required to explain why the matter should be allowed to proceed to substantive hearing. This additional step will ensure that allegations the subject of a complaint can only be litigated where there are reasonable prospects of success, limiting unnecessary impositions on time and resources, and avoiding prolonged uncertainty.

55. ***Costs*** – Items 47, 54 and 57 will introduce provisions relating to costs to discourage unmeritorious complaints progressing to the Federal Court or the Federal Circuit Court. These amendments will implement PJCHR recommendation 19.

56. Item 47 will require the Commission to provide a statement about the powers of the Federal Court and the Federal Circuit Court to the complainant when it terminates a complaint. Item 57 will ensure that the Court can consider a respondent's offer to settle an unlawful discrimination matter in determining whether to award costs.

Amendments requested by the Commission

57. The following amendments in the Bill respond to recommendations requested by the Commission to aid its smooth operation.

58. ***Human rights and equal opportunity in employment inquiry functions*** – Items 6–9, 11–14, 16 and 17 will amend the Commission's functions with respect to human rights and equal opportunity in employment functions. Complaints made under the Commission's human rights or equal opportunity in employment functions cannot, unlike unlawful discrimination complaints, proceed to the Federal Court or the Federal Circuit Court for determination.

59. Items 6, 7, 11, 12, 16 and 17 will replace the mandatory duty for the Commission to report to the Minister with discretion to report to the Minister. The Commission currently has a mandatory duty to report regarding a human rights inquiry or an equal opportunity in employment inquiry where the Commission finds the inquiry is made out and settlement is inappropriate or unsuccessful. These amendments will maintain the complainants and respondents as the principal recipients of the report, with the Minister informed of major issues at the Commission's discretion. These amendments are intended to reduce the administrative burden of mandatory reporting on the Commission and the Government which is imposed by reports that do not raise significant issues. At the same time, these amendments will broaden the Commission's ability to formally report to the Minister, as the Commission will no longer be limited to only report on complaints in which settlement was inappropriate or unsuccessful.

60. Items 8, 9, 13 and 14 will introduce three new grounds by which the Commission may close a human rights inquiry or an equal opportunity in employment inquiry. The Commission will be empowered to close an inquiry where it is satisfied that the inquiry or the continuation of an inquiry is not warranted, where there is no reasonable prospect of conciliation or where there is no reasonable prospect of the matter being resolved in favour of the complainant. These amendments will allow the Commission to expeditiously dispose of human rights and equal opportunity in employment complaints that are ill-conceived or vexatious.

61. ***Discretion to produce statutory reports*** – Items 18–26 and Item 1 of Schedule 3 will replace the duty of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the National Children's Commissioner to produce annual statutory reports with discretion to provide reports to the Minister when the Commissioners see fit.

62. These amendments will broaden the Commissioners' ability to formally report to the Minister. They will no longer be limited to a single annual report, and will have greater flexibility to manage priority work, ensuring that reports are produced as needed and when appropriate, rather than annually. The Commissioners may choose to continue submitting reports on an annual basis; however, this will no longer be required.

63. ***Governance of the Commission*** – Items 3 and 5 will improve the governance arrangements of the Commission.

64. Item 3 will replace the requirement that Commissioners act in a way that promotes the collegiality of the Commission with a requirement that the Commissioners must cooperate to achieve common objectives where practicable. Collegiality requirements are generally not included in governance arrangements for statutory bodies. This amendment will bring the AHRC's governance arrangements to be more in line with those of other Commonwealth Commissions. As well, the amendment will remove the implied statutory pressure upon Commissioners to arrive at a common view. The promotion of 'groupthink' is an undesirable and inappropriate statutory objective.

65. Item 5 will introduce an express power for the President to manage the administrative affairs of the Commission. The President previously had to rely on implied powers to do so.

66. ***Voluntary and compulsory conciliation conferences*** – Items 49–51 will ensure that both voluntary and compulsory conciliation conferences are regulated by the AHRC Act. The Commission may hold both voluntary and compulsory conferences; however the AHRC

Act currently only regulates the holding of compulsory conferences. Compulsory conferences are very rarely conducted by the Commission.

67. These amendments will ensure that procedures surrounding voluntary conferences are also proscribed, providing certainty to complainants and respondents concerning the process and requirements of conciliation conferences.

68. ***Confidentiality of conciliation*** – Item 49 will ensure that things said or done in the context of conciliation are not later admissible in evidence in subsequent proceedings relating to the complaint.

69. While it is generally understood that conciliation proceedings are confidential, the AHRC Act did not fully reflect this understanding. This amendment will accord with accepted alternative dispute resolution practice and will bring certainty to respondents and complainants. It will ensure that parties are encouraged to actively take part in the conciliation process without fear that what they have said or done may be used against them in court.

FINANCIAL IMPACT

70. This Bill will have a nil or insignificant financial impact on Commonwealth Government departments and agencies.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Human Rights Legislation Amendment Bill 2017

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Human Rights Legislation Amendment Bill 2017 responds to the recommendations of the Parliamentary Joint Committee on Human Rights' (PJCHR) Report into Freedom of Speech in Australia.

The *Racial Discrimination Act 1975* (the RDA) implements Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD). The RDA prohibits discrimination on the basis of race, colour or national or ethnic origin in all areas of public life and provides civil remedies where such a contravention occurs.

Part IIA of the RDA was introduced by the *Racial Hatred Act 1995*. Part IIA includes section 18C, which makes it unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people. The act must be done because of the race, colour or national or ethnic origin of the person or group. Section 18D provides a number of exemptions to section 18C, including for acts done in the performance, exhibition or distribution of an artistic work, fair and accurate reporting or acts done in the course of any genuine academic, artistic or scientific purpose or any other purpose in the public interest.

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 Bill removes the words 'offend, insult, humiliate' from paragraph 18C(1)(a), retains the word 'intimidate' and inserts the word 'harass'. This amendment provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to harass or intimidate another person or a group of people on the basis of their race, colour or national or ethnic origin. The Bill also clarifies that the objective standard by which contravention of section 18C should be determined is that of the reasonable member of the Australian community.

The Australian Human Rights Commission is an independent statutory body established by the *Australian Human Rights Commission Act 1986* (the AHRC Act). The Commission has the ability to inquire into and attempt to conciliate complaints of unlawful discrimination. Where a complaint cannot be successfully resolved through the Commission's processes, the complainant may make an application to the Federal Court or Federal Circuit Court alleging unlawful discrimination.

The Bill amends the AHRC Act to address concerns articulated throughout the PJCHR Inquiry about the ability of the complaints handling process to appropriately address unmeritorious complaints, reflecting a view that the complaints handling process is currently

weighted in favour of complainants. The Bill introduces amendments to ensure that unmeritorious complaints are disposed at each stage of the complaints process, including in the Federal Court or Federal Circuit Court, and that each party to the complaint is treated fairly throughout the process. The amendments include provisions that:

- provide that, in dealing with complaints, the Commission is required to act fairly to both parties, including through appropriate notification of the existence of a complaint and timely resolution of complaints (Items 10, 15 and 36)
- raise the threshold required for the Commission to accept a complaint (Items 1, 2, 27, 28, 32, 33, 35, 38 and 40)
- provide additional powers to the Commission to terminate unmeritorious complaints at the earliest opportunity (Items 29, 30, 31, 34, 37, 39, 41, 43–46, 48, 52, 55 and 56)
- require the Commission to consider relevant exemptions to anti-discrimination laws when considering whether to terminate a complaint (Item 42)
- require an applicant to seek the leave of the Federal Circuit Court or the Federal Court to make an application alleging unlawful discrimination when the complaint had been terminated by the President, except if the complaint involves an issue of public importance (Item 53); and
- require the Commission to inform complainants of the costs jurisdiction of the Federal Court and the Federal Circuit Court provide discretion for the courts to have regard to settlement offers in determining costs (Items 47, 54 and 57).

The Bill also makes minor technical amendments to improve the Commission's reporting obligations (Items 6–9, 11–14, 16 and 17), conciliation processes (Items 49–51) and governance arrangements (Items 3 and 5).

The Bill makes a minor amendment to the *Native Title Act 1993* to remove a mandatory duty for the Aboriginal and Torres Strait Islander Social Justice Commissioner to report on the operation of the *Native Title Act* from section 209 of the *Native Title Act* and instead provide for discretionary reporting, with the relevant provision appearing in the AHRC Act.

Human rights implications

The amendments to the RDA and the AHRC Act made by this Bill engage the following rights and freedoms:

- the right to freedom of expression
- the rights to equality and non-discrimination, and the prohibition of advocacy of hatred that constitutes incitement to discrimination
- the right to an effective remedy
- the right to a fair hearing; and
- the presumption of innocence

Freedom of opinion and expression

Under international law, the right to freedom expression is enshrined in article 19(2) of the *International Covenant on Civil and Political Rights (ICCPR)*.

The right to freedom of expression is the right to seek, receive and impart information and ideas of all kinds and extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

The right to freedom of expression protects both favourable and unfavourable information and ideas, including information and ideas that may offend or shock. The Bill promotes the right to freedom of expression by removing the words ‘offend’, ‘insult’ and ‘humiliate’ from section 18C, ensuring that the law does not unjustifiably prevent a person from expressing opinions and genuine beliefs, even where controversial, because they may merely offend, insult or humiliate another person or groups of people. This will allow for more frank and open public discussion and debate without unreasonable legal sanctions. This is consistent with the right to freedom of expression.

Harassment or intimidation of a person or group based upon race, colour or national or ethnic origin are species of conduct which, from the view point of both protection from racial vilification and promotion of social order, are not a legitimate exercise of free speech, even though the conduct may consist of the utterance of words. Just as the law does not protect the utterance of words constituting a crime or a civil wrong on free speech grounds, nor should it protect intimidation or harassment.

Additionally, the Bill makes no changes to the exemptions in section 18D of the RDA. The exemptions ensure that nothing which is said or done reasonably and in good faith in the performance, exhibition or distribution of an artistic work, the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic, or scientific purpose or for any other genuine purpose in the public interest, or in making or publishing a fair and accurate report or a fair comment of genuine belief constitutes unlawful discrimination for the purposes of section 18C. Accordingly, section 18D protects expressions which may be harassing or intimidating, but are done reasonably and in good faith in light of the grounds in section 18D. The amendments in this Bill are proportionate limitations on freedom of expression as the expression of genuine belief or opinion in the public interest, even where harassing or intimidating, is not unlawful.

The standard of conduct introduced by the Bill will ensure that section 18C operates as an appropriate and permissible limitation on Article 19, by appropriately balancing the right to freedom of expression and the right to equality and non-discrimination.

The rights to equality and non-discrimination and the prohibition of advocacy of hatred that constitutes incitement to discrimination

The rights to equality and non-discrimination are contained in articles 2 and 26 of the ICCPR. The rights to equality and non-discrimination provide that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. As a result, laws must prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour or national origin.

Articles 2, 4 and 5 of the CERD also impose an obligation on State Parties to eliminate and prohibit racial discrimination and to support measures to ensure that all racial groups have equal enjoyment of civil, economic, social and cultural rights.

Article 2 creates an obligation on States Parties to prohibit and bring to an end, by all appropriate means, including legislation, racial discrimination.

Article 4 of the CERD requires States Parties to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, racial discrimination including, under article 4(a), criminalisation of all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any racial or ethnic groups. Australia has made an interpretative declaration in relation to article 4(a), which states:

The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).

Article 5 requires States Parties to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, including in enjoyment of civil, economic, social and cultural rights.

The amendments proposed by this Bill promote the rights of equality and non-discrimination. Section 18C as amended prohibits acts that a reasonable member of the Australian community would consider harasses or intimidates a person based on their race, colour or national or ethnic origin. The Bill maintains and provides civil protections against racial discrimination to ensure that all are able to enjoy the equal realisation and exercise of their rights under the ICCPR and CERD. The amendments in the Bill are directed towards the elimination of racial discrimination as required by the ICCPR and CERD.

By redefining the conduct which is prohibited, the Bill will not reduce protections against racial vilification. Rather, the Bill will ensure that conduct which does not constitute vilification, but merely offends the feelings of particular individuals or groups, is not made unlawful. The new standard of 'harass or intimidate' will more directly target the core concept of racial vilification, protecting the rights of all persons to live free from fear of violence and racial discrimination.

The amendments within this Bill do not limit the general prohibition of racial discrimination in section 9 of the RDA. Section 9 of the RDA implements Australia's obligation to prohibit racial discrimination in specified areas of public life. Individuals who have been subject to racial discrimination are still able to make a complaint to the Commission under section 9 of the RDA. The amendments to the Commission's complaints handling procedures do not affect meritorious complaints, as discussed below.

The right to an effective remedy

Article 2(3) of the ICCPR requires States Parties to ensure that, where a person's rights or freedoms under the ICCPR are violated, they have access to an effective and enforceable remedy determined by competent judicial, administrative or legislative authorities. Similarly, Article 6 of the CERD provides that effective protection and remedies should be available through a national tribunal or other State institution against any acts of racial discrimination which violate a person's human rights or fundamental freedoms under the CERD.

The right to an effective remedy encompasses an obligation to bring perpetrators of human rights abuses, including discrimination, to justice and to provide appropriate reparation to victims. Examples of reparation include compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.

The amendments to the RDA will not remove the rights of individuals to pursue a remedy in respect of racial discrimination. Persons aggrieved by conduct will still be able to make a complaint to the Commission, which may attempt to inquire into and conciliate that complaint. If the complaint is not resolved before the Commission, the complainant may seek leave to apply to the Federal Court or the Federal Circuit Court (the Courts) for an enforceable remedy.

The Commission's complaints handling process provides for a number of remedies for individuals who have been the subject of unlawful discrimination in accordance with the RDA, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. The Commission's conciliation function allows complainants and respondents to mutually agree to appropriate remedies for the relevant conduct. Examples of outcomes previously conciliated by the Commission include apologies, monetary compensation and systemic changes, such as changes to employment policies or anti-discrimination training. The proposed amendments will not limit the ability of individuals who have been subject to unlawful discrimination to seek these remedies. Rather, the amendments will limit the ability of complainants to attempt to obtain remedies through the complaints system where their complaint is unmeritorious and does not constitute unlawful discrimination.

The amendments in this Bill requiring complainants to seek leave of the Courts to make an application alleging unlawful discrimination in certain circumstances do not limit the right to an effective remedy. In the event that a complaint is terminated by the Commission, the complainant may apply to the Courts for an enforceable remedy.

The leave provisions in Item 53 do not restrict the powers of the Courts to ultimately determine the legal rights of parties to an unlawful discrimination application. Rather, these amendments allow the Courts to consider, at the earliest opportunity, whether an application has sufficient merit to proceed to a full hearing. Meritorious complaints will proceed to a full hearing, and the Courts will maintain the ability to make orders where satisfied that there has been unlawful discrimination. These orders may include an apology, damages, reinstatement of employment, provision of goods or services, or a combination of these remedies.

The amendments in this Bill do not limit access to an effective and enforceable remedy for persons whose rights to equality and non-discrimination under article 26 of the ICCPR have been violated. Access to an effective and enforceable remedy is maintained through the Commission's inquiry and conciliation function and the Courts ability to make a determination.

The right to a fair hearing

Article 14 of the ICCPR provides that all people are to be equal before courts and tribunals and that everyone, in the determination of rights and obligations in civil proceedings, is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The amendment in this Bill requiring complainants to seek leave of the Courts to make an application alleging unlawful discrimination in certain circumstances does not limit the right to an effective remedy. In the event that a complaint is terminated by the Commission, the complainant may apply to the Courts for a determination of their rights and obligations regarding the alleged unlawful discrimination.

The Federal Court and the Federal Circuit Court are competent, independent and impartial courts established by law. The requirement that an applicant seek leave to the Courts to make an application alleging unlawful discrimination does not remove access to the courts to determine their matter; rather, this amendment will allow the Courts to consider, at the earliest opportunity, whether an application has sufficient merit to proceed to a full hearing.

The requirement to seek leave does not limit the principle of equality of arms as the applicant is not disadvantaged as against other parties to the proceeding. Rather, both the applicant and the respondent have a reasonable opportunity of presenting their case to the court for it to make a determination as to whether the applicant should be granted leave.

The amendments in this Bill relating to the Commission's administrative complaints handling process do not engage the right to a fair hearing.

The Commission is an administrative body, and although it provides an avenue for persons alleging unlawful discrimination to pursue an application in the Courts, it is unable to make a determination of law that the conduct the subject of a complaint constitutes unlawful discrimination. Accordingly, the Commission makes no determination of rights and obligations in a suit at law, as required to enliven the right to a fair hearing in Article 14(1). Rather, the Courts make such determinations when an application is made alleging unlawful discrimination under section 46PO of the AHRC Act.

The amendments in the Bill will ensure that all parties to a complaint are treated fairly, including through requiring that all relevant parties are notified of the complaint against them, ensuring that they are given the opportunity to refute any such claims. Additionally, the amendments will ensure that the Commission's dispute resolution processes are fair and accessible to both complainants and respondents, addressing community concerns that the previous processes were weighted in favour of complainants.

The amendments in this Bill are compatible with the right to a fair hearing.

The presumption of innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence is also a fundamental principle of the common law.

Item 29 of the Bill creates a strict liability offence where a person has been given a notice to attend a compulsory conciliation conference and the person refuses or fails to attend that conference. This amendment does not create a new offence, but transfers the current strict liability offence from section 46PL of the AHRC Act into the new section 46PJ. The general defences under the Criminal Code, including a defence of mistake of fact, are available to a defendant under this offence.

This amendment engages and limits the presumption of innocence. The prosecution is only required to prove the physical element of the offence and is not required to prove a fault element. This limitation is reasonable, necessary and proportionate to a legitimate aim.

The application of strict liability is necessary to ensure that, when the Commission exercises its compulsory powers to conciliate a complaint, a person may not frustrate that compulsory conciliation. As discussed above, these conciliation functions provide an effective remedy to persons whose rights under the ICCPR have been violated. It is reasonable not to require the prosecution to prove a fault element in circumstances where the individual had been given reasonable notice to attend a conference and did not attend, particularly in circumstances where Item 29 of the Bill requires the Commonwealth to pay a reasonable sum for the individual's expenses of attendance. Strict liability is therefore only used where the individual is clearly aware of his or her duties and obligations. This offence is proportionate as it only applies to individuals who have received notice that they are required to attend a conference, and do not, in fact, attend. It would not apply in circumstances where a person had a reasonable and mistaken understanding of circumstances (for example, where a person did not receive the notice of the requirement to attend).

Conclusion

The Bill is compatible with human rights because it advances the protection of human rights, particularly freedom of expression, and maintains protections for the right to equality and non-discrimination. The limitation on the presumption of innocence is reasonable, necessary and proportionate to a legitimate aim. The Government considers that the amendments in this Bill do not affect Australia's implementation of its obligations under CERD.

NOTES ON CLAUSES

Preliminary

Clause 1 **Short title**

1. This clause provides for the short title of the Act to be the *Human Rights Legislation Amendment Act 2017*.

Clause 2 **Commencement**

2. This clause provides for the commencement of each provision in the Bill, as set out in the table. Item 1 in the table provides that the whole of the Bill will commence on the day after this Act receives Royal Assent.

Clause 3 **Schedules**

3. This clause provides that each Act specified in a Schedule to the Bill will be amended or repealed as set out in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – Amendment of the *Racial Discrimination Act 1975*

Racial Discrimination Act 1975

Item 1 Heading of Part IIA

4. This item repeals the heading of Part IIA and replaces it with a new heading which reflects the prohibition of harassing or intimidating behaviour done because of race, colour or national or ethnic origin. This amendment recognises that behaviour which is merely offensive is no longer, for that reason alone, proscribed by section 18C.

5. This item also removes the reference to ‘racial hatred’ in the heading of Part IIA. In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, the Federal Court held that, despite the reference to ‘racial hatred’ in the heading of Part IIA, there is no requirement that the alleged act be based upon racial hatred. This amendment makes clear that an act need only be done because of the race, colour or national or ethnic origin of a person, rather than because of racial hatred.

Item 2 Heading of section 18C

6. This item repeals the heading of section 18C and replaces it with a new heading which reflects the prohibition of harassing or intimidating behaviour done because of race, colour or national or ethnic origin. This amendment recognises that behaviour which is merely offensive is no longer, for that reason alone, proscribed by section 18C.

Item 3 Paragraph 18C(1)(a)

7. This item removes the terms ‘offend’, ‘insult’ and ‘humiliate’ from section 18C and inserts the term ‘harass’. This amendment will implement PJCHR recommendation 3(c).

Item 4 Subsections 18C(2A), 18C(2B)

8. This item inserts subsections 18C(2A) and 18C(2B), which qualify the application of subsection 18C(1).

9. Subsection 18C(2A) provides that the question of whether an act is reasonably likely, in all the circumstances, to harass or intimidate another person or a group of people is to be determined by the standards of a reasonable member of the Australian community.

10. The courts have held that the test under the RDA requires an assessment of the likely effect of the alleged act on a reasonable hypothetical member of the particular racial or ethnic group of which the complainant is a member. In assessing the reaction of the reasonable representative, the court will consider the values, standards and circumstances of that group as well as the relevant social, cultural, historical and other circumstances.

11. This amendment will substitute the reasonable representative test for the standard of the reasonable member of the Australian community. Therefore, for an act to be unlawful under section 18C a reasonable member of the Australian community must be of the view that the act must be reasonably likely, in all the circumstances, to harass or intimidate a person or a group of people on the basis of their race, colour or national or ethnic origin.

12. This amendment will implement PJCHR recommendation 3(e).
13. Subsection 18C(2B) clarifies, for the purposes of subsection (1), that an act may be a single isolated act, one of a series of acts or one of a group of acts.
14. This amendment will, in particular, clarify the meaning of ‘harass’. The Macquarie Dictionary defines ‘harass’ as ‘to trouble by repeated attacks, incursions etc’. However, the Concise Oxford Dictionary defines ‘harass’ as ‘vex by repeated acts: trouble, worry’. The term has, in other Commonwealth legislation, been judicially interpreted to connote repetition, persistence or at least some course of conduct. In the context of the section 471.12 of the Criminal Code, in *Monis v The Queen* [2013] HCA 4 (*Monis*) Hayne J had regard to the dictionary meaning of ‘harass’, concluding that ‘harass’ connotes ‘troubling or vexing by repeated acts.’ However, the judicial interpretation has been inconsistent: in *Hall v Sheiban* (1989) 20 FCR 217, at least one of the members of the Federal Court considered that, in an appropriate case, a single isolated act may constitute harassment. Given the ambiguity both in case law and from a lexicographical point of view about whether a single act can constitute harassment, it is desirable to clarify this matter. The amendment makes it clear that both a single act and repeated acts may constitute harassment.
15. On the basis of subsection 18C(2B) the term ‘harass’ in paragraph 18C(1)(a) may capture a single act, such as a person being verbally attacked on public transport on the basis of their race; one of a series of acts, such as a person repeatedly distributing leaflets with intimidating language relating to a particular racial group; or one of a group of related acts, such as a person verbally attacking another person and then posting similar racial attacks on social media.

Item 5 Application of amendments

16. This item provides that amendments made by this Schedule apply in relation to an act done after the commencement of this item.

Schedule 2 – Amendment of the Australian Human Rights Commission Act 1986

Australian Human Rights Commission Act 1986

Items 1 and 2 Subsection 3(1)

17. Item 1 inserts a definition of ‘alleged acts, omissions or practices’ in section 3 of the AHRC Act.
18. Item 2 repeals the definition ‘alleged unlawful discrimination’ from section 3 of the AHRC Act.
19. As a consequence of introducing a higher threshold for lodging complaints with the Australian Human Rights Commission (the Commission) in Part IIB of the AHRC Act, complaints will have to set out the specific conduct that is alleged to be unlawful discrimination. Therefore, references to ‘alleged unlawful discrimination’ will be replaced with ‘alleged acts, omissions or practices’.
20. This drafting change will make the AHRC Act clearer and will address repetitive language. For example, the ground for termination of a complain paragraph 46PH(1)(a):
 - the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination

will be changed to:

- the President is satisfied that the *acts, omissions or practices* are not unlawful discrimination.

Item 3 Subsection 8(2)

21. This item repeals the requirement for the President and Commissioners to act in a way that promotes the collegiate nature of the Commission.
22. This item inserts a requirement that the President and Commissioners must co-operate to achieve common objectives, where practicable. This does not affect the operation of section 44 which concerns resolution of disputes in meetings of the Commission.
23. This amendment brings the governance of the Commission into line with other statutory bodies which ordinarily have no such requirement of collegiality. As well, the amendment will remove the implied statutory pressure upon Commissioners to arrive at a common view. The promotion of ‘groupthink’ is an undesirable and inappropriate statutory objective.

Item 4 Subsection 8(6A)

24. This item provides that the powers of the Commission to report to the Minister in relation to human rights inquiries or equal opportunity in employment inquiries under sections 20A and 32A, must be exercised by the President. A reference in this Act to the Commission or to a member of the Commission must be read as a reference to the President in relation to the exercise of any of those powers.

25. This amendment is consistent with subsection 8(5) which provides that the functions of the Commission under paragraphs 11(1)(f) and 31(b), being the human rights inquiry and equal opportunity in employment inquiry function respectively, are to be performed by the President.

26. This amendment is consequential to Items 11 and 16, which introduce discretion, rather than a duty, to provide human rights and equal opportunity in employment reports to the Minister.

Item 5 Subsection 8A(5)

27. This item inserts a new subsection in section 8A providing that the President has the express power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions.

28. Subsection 8A(3) provides that the President is responsible for managing the administrative affairs of the Commission. Additionally, for the purposes of the *Public Governance, Performance and Accountability Act 2013*, subsection 8A(4) provides that the President is the accountable authority of the Commission.

29. The President currently relies on implied powers to manage the administrative affairs of the Commission. This amendment will ensure the Commission has the necessary express powers to do fulfil his or her functions.

Item 6 Paragraph 11(1)(f)

30. This item amends paragraph 11(1)(f) relating to the Commission's human rights inquiry function to remove the mandatory duty to provide a report to the Minister under subparagraph 11(1)(f)(ii). Item 11 introduces section 20A which replaces the duty to report under subparagraph 11(1)(f)(ii) with discretion for the President to report to the Minister.

31. Currently the Commission is required to report to the Minister in relation to a human rights inquiry in situations where the Commission finds that the act or practice is inconsistent with or contrary to any human right, and attempting to settle the matter is not appropriate or is unsuccessful. Once a report has been provided to the Minister, it must be tabled in Parliament. This item will remove the mandatory duty to report to the Minister.

32. An act or practice for the purposes of this function is an act or practice done by or on behalf of the Commonwealth, under an enactment or wholly or partly within a Territory. Complainants under this function have no right to proceed to the Federal Court or the Federal Circuit Court.

Item 7 Subsection 19(2BA)

33. This item inserts a new provision into section 19 which provides that the President cannot delegate his or her powers under sections 20A and 32A. This amendment ensures that only the President can exercise the discretion to provide human rights and equal opportunity in employment reports to the Minister. This amendment is consequential to the Items 4, 11 and 16.

34. This item is consistent with subsection 19(2B) which does not allow the President to delegate his or her powers relating to the conduct of human rights inquiry or equal opportunity employment complaints to another member of the Commission other than the Human Rights Commissioner. As the powers under subsection 8(6A) relate only to the decision to report to the Minister, rather than the inquiry function itself, it is appropriate that this power only be exercisable by the President.

Item 8 Paragraph 20(2)(ba)

35. This item introduces a new ground under which the Commission may close a human rights inquiry conducted in accordance with paragraph 11(1)(f).

36. In the case where an inquiry is being conducted on the basis of a complaint made to the Commission, upon request of the Minister or upon the Commission's own-motion, paragraph 20(2)(ba) provides that the Commission may decide not to inquire, or not to continue to inquire, into the act or practice where the Commission is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted.

37. This amendment will allow the Commission to close human rights inquiries that are no longer necessary given the circumstances of the case. This may include complaints which are ill-conceived or vexatious, or in which the necessary information to support the complaint or inquiry has not materialised. This will also harmonise the grounds for closing a human rights inquiry with the grounds for closing an unlawful discrimination complaint.

Item 9 Subparagraphs 20(2)(c)(iia) and (iib)

38. This item introduces new grounds under which the Commission may close a human rights inquiry conducted in accordance with paragraph 11(1)(f).

39. In a case where an inquiry is being conducted on the basis of a complaint made to the Commission, subparagraphs 20(2)(c)(iia) and 20(2)(c)(iib) provide that the Commission may decide not to inquire, or not to continue to inquire, into the act or practice where the Commission is of the opinion that there is no reasonable prospect that the complaint will be resolved in favour of the complainant or complainants, or where the Commission is satisfied that there is no reasonable prospect of conciliation.

40. These amendments will allow the Commission to expeditiously dispose of human rights complaints, including those that are trivial, vexatious, misconceived, lacking in substance, or where there is no reasonable prospect of the complaint being successfully resolved. . This will also harmonise the grounds for closing a human rights inquiry with the grounds for closing an unlawful discrimination complaint.

Item 10 Subsections 20(9), (10), (11) and (12)

41. This item introduces principles by which the Commission's dispute resolution functions in relation to human rights inquiries must be carried out. When the Commission conducts a human rights inquiry, the Commission is expected to observe the principles of natural justice. Although natural justice already applies to the Commission's handling of complaints, these principles make the President's obligation to act fairly to all parties and to act expeditiously clear on the face of the AHRC Act.

42. Subsection 20(9) requires the Commission to act fairly in the performance of its human rights inquiry functions. This will ensure the Commission acts fairly to the complainant (or complainants) and the respondent (noting the definition of ‘respondent’ in section 3 of the AHRC Act can include more than one person) in the course of inquiring into a human rights complaint. This will include an obligation on the Commission not to favour the complainant (or complainants) or the respondent, in light of the overall requirements of the AHRC Act. The obligation to act fairly concerns the fairness of the procedures adopted by the Commission, not the fairness of the outcome of a complaint. The requirement to act fairly includes offering reasonable assistance to complainants and respondents. An example of such assistance would be helping a person with disability to transcribe information. It is not intended to extend to the provision of legal advice.

43. Subsection 20(10) requires the Commission to act expeditiously, and to use its best endeavours to finalise a complaint within 12 months after lodgement.

44. Subsections 20(11) and (12) ensure that no legal rights will flow from a failure by the President or the Commission to resolve complaints in accordance with the principles in subsections (9) and (10), other than a legally enforceable obligation to observe the rules of natural justice. In the case of failure to observe natural justice, however, observance of the rules of natural justice may be the subject of enforcement by judicial proceedings.

45. This item replicates Items 15 in relation to the Commission’s equal opportunity in employment function.

46. This item will implement PJCHR recommendations 5, 6 and 7.

Item 11 Section 20A

47. This item inserts a new provision, section 20A, which provides a discretionary power for the President of the Commission to report to the Minister regarding a human rights inquiry. This item is consequential to Item 6 which removes the Commission’s mandatory duty to report to the Minister in relation to such an inquiry, in certain circumstances, under subparagraph 11(1)(f)(ii).

48. This amendment will provide the Commission with discretion to report to the Minister on human rights inquiries where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right and where the Commission considers it appropriate to do so. This amendment will broaden the Commission’s ability to report to the Minister, as the Commission will now have the ability to report to the Minister regarding successfully conciliated or settled complaints, rather than only inquiries in which settlement has been inappropriate or unsuccessful.

Item 12 Paragraph 31(b)

49. This item amends paragraph 31(b) relating to the Commission’s equal opportunity in employment inquiry function to remove the mandatory duty to provide a report to the Minister under subparagraph 31(b)(ii). Item 16 introduces section 32A which replaces the duty to report under subparagraph 31(b)(ii) with discretion for the President to report to the Minister.

50. Currently the Commission is required to report to the Minister in relation to an equal opportunity in employment inquiry in situations where the Commission finds that the act or practice, including any systemic practice, may constitute discrimination in employment, and attempting to settle the matter is not appropriate or is unsuccessful. Once a report has been provided to the Minister, it must be tabled in Parliament. This item will remove the mandatory duty to report to the Minister.

51. Discrimination for the purposes of this function is any distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Although a complaint of unlawful discrimination may also fall within the equal opportunity in employment function, complaints under this function typically relate to attributes which are within the AHRC Act but are not protected in Commonwealth anti-discrimination law, such as discrimination in employment on the basis of criminal record or trade union activity. As these attributes are not protected by anti-discrimination law, complainants under this function cannot proceed to the Federal Court or the Federal Circuit Court.

Item 13 Paragraph 32(3)(ba)

52. This item introduces a new ground under which the Commission may close an equal opportunity in employment inquiry conducted in accordance with paragraph 31(1)(b).

53. In the case where an inquiry is being conducted on the basis of a complaint made to the Commission, upon request of the Minister or upon the Commission's own-motion, paragraph 32(3)(ba) provides that the Commission may decide not to inquire, or not to continue to inquire, into the act or practice where the Commission is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted.

54. This amendment will allow the Commission to close equal opportunity in employment inquiries that are no longer necessary given the circumstances of the case. This may include complaints which are ill-conceived or vexatious, or in which the necessary information to support the complaint or inquiry has not materialised. This will also harmonise the grounds for closing an equal opportunity in employment inquiry with the grounds for closing an unlawful discrimination complaint.

Item 14 Subparagraphs 32(3)(c)(iia) and (iib)

55. This item introduces new grounds under which the Commission may close an equal opportunity in employment inquiry conducted in accordance with paragraph 31(1)(b).

56. In a case where an inquiry is being conducted on the basis of a complaint made to the Commission, subparagraphs 32(3)(c)(iia) and 32(3)(c)(iib) provide that the Commission may decide not to inquire, or not to continue to inquire, into the act or practice where the Commission is of the opinion that there is no reasonable prospect that the complaint will be resolved in favour of the complainant or complainants, or there is no reasonable prospect of conciliation.

57. These amendments will allow the Commission to expeditiously dispose of equal opportunity in employment complaints, including those that are ill-conceived or vexatious.

This will also harmonise the grounds for closing a human rights inquiry with the grounds for closing an unlawful discrimination complaint.

Item 15 Subsections 32(4), (5), (6) and (7)

58. This item introduces principles by which the Commission's dispute resolution functions in relation to equal opportunity in employment inquiries must be carried out. When the Commission conducts an equal opportunity in employment inquiry, the Commission is expected to observe the principles of natural justice. Although natural justice already applies to the Commission's handling of complaints, these principles make the President's obligation to act fairly to all parties and to act expeditiously clear on the face of the AHRC Act.

59. Subsection 32(4) requires the Commission to act fairly in the performance of its equal opportunity in employment functions. This will ensure the Commission acts fairly to the complainant (or complainants) and the respondent (noting the definition of 'respondent' in section 3 of the AHRC Act can include more than one person) in the course of inquiring into an equal opportunity in employment complaint. This will include an obligation on the Commission not to favour the complainant (or complainants) or respondent, in light of the overall requirements of the AHRC Act. The obligation to act fairly concerns the fairness of the procedures adopted by the Commission, not the fairness of the outcome of a complaint. The requirement to act fairly includes offering reasonable assistance to complainants and respondents. An example of such assistance would be helping a person with disability to transcribe information. It is not intended to extend to the provision of legal advice.

60. Subsection 32(5) requires the Commission to act expeditiously, and the Commission must use its best endeavours to finalise a complaint within 12 months after lodgement.

61. Subsections 32(6) and (7) ensure that no legal rights will flow from a failure by the President or the Commission to resolve complaints in accordance with the principles in subsections 32(4) and (5), other than a legally enforceable obligation to observe the rules of natural justice. In the case of failure to observe natural justice, however, observance of the rules of natural justice may be the subject of enforcement by judicial proceedings.

62. This item replicates Items 10 in relation to the Commission's human rights function.

63. This item will implement PJCHR recommendations 5, 6 and 7.

Item 16 Section 32A

64. This item inserts a new provision, section 32A, which provides a discretionary power for the President of the Commission to report to the Minister regarding an equal opportunity in employment inquiry. This item is consequential to Item 12 which removes the Commission's mandatory duty to report to the Minister in relation to such an inquiry, in certain circumstances, under subparagraph 31(b)(ii).

65. This amendment will provide the Commission with discretion to report to the Minister on equal opportunity in employment inquiries where the Commission is of the opinion that the act or practice constitutes discrimination in employment and where the Commission considers it appropriate to do so. This amendment will broaden the Commission's ability to report to the Minister, as the Commission will now have the ability to report to the Minister

regarding successfully conciliated or settled complaints, rather than only inquiries in which settlement has been inappropriate or unsuccessful.

Item 17 Section 46

66. This item provides that discretionary reports provided to the Minister under sections 20A and 32A are not required to be tabled. The tabling requirements for other reports produced by the Commission, such as reports regarding the examination of enactments under paragraph 11(1)(e), reports regarding laws that should be made by Parliament under paragraph 11(1)(j) or reports as to action that needs to be taken by Australia to comply with its international obligations under paragraph 11(1)(k), are not affected by this amendment.

67. It is intended that the President will publish any reports provided to the Minister as he or she sees fit. This amendment is not intended to reduce public scrutiny of Commission reports. Rather, it is intended to reduce the administrative and resource cost of producing reports for tabling for the Commission.

Item 18 Heading of section 46C

68. This item amends the current heading to section 46C to reflect that section 46C includes exercises of powers as well as the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner (the Social Justice Commissioner). This amendment is consequential to the amendments by Item 20 to include a discretionary power to report to the Minister.

Item 19 Paragraph 46C(1)(a)

69. This item repeals paragraph 46C(1)(a) which requires the Social Justice Commissioner to submit an annual statutory report to the Minister regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders. Item 20 inserts discretion for the Social Justice Commissioner to produce such a report when he or she sees fit.

Item 20 Subsections 46C(2A), (2B) and (2C)

70. This item inserts discretion for the Social Justice Commissioner to submit reports to the Minister relating to the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders and the operation of the *Native Title Act 1993*.

71. Subsection (2A) introduces discretion for the Social Justice Commissioner to report to the Minister regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders. This replaces the mandatory duty to report under paragraph 46C(1)(a), which is repealed by Item 19.

72. Subsection (2B) introduces discretion for the Social Justice Commissioner to report to the Minister regarding the operation of the *Native Title Act* and the effect of that Act on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders. This replaces the mandatory duty to report under subsection 209(1) of the *Native Title Act*, which is repealed by Item 1 of Schedule 3.

73. Subsection (2C) ensures that reports under subsection (2A) and (2B) may include recommendations as to the action that should be taken. This replicates the previous requirement to include recommendations under the repealed paragraph 46C(1)(a). There is no requirement that these reports contain recommendations.

Item 21 Subsections 46C(3) and (4)

74. This item is consequential to the introduction of discretion to report to the Minister by Item 20.

75. This amendment will ensure that the Social Justice Commissioner, in exercising his or her powers to submit a discretionary report, has the same consultative powers and human rights jurisdiction as the Social Justice Commissioner has in relation to mandatory reports under paragraph 46C(1)(a).

Item 22 Section 46M

76. This item is consequential to the repeal of paragraph 46C(1)(a) by Item 19 and the introduction of discretionary reporting grounds by Item 20.

77. This item will maintain current tabling arrangements. The amendment will allow reports produced by the Social Justice Commissioner under section 46C to be tabled in Parliament.

78. This item will also require Native Title reports to be tabled in Parliament. There is no express obligation that Native Title reports be tabled in Parliament under the *Native Title Act*. However, since 2013 the Social Justice Report and the Native Title Report have been produced as a single report and accordingly tabled. This amendment will ensure the practical tabling arrangements in place since 2013 are maintained.

Item 23 Heading of section 46MB

79. This item amends the current heading to section 46MB to reflect that section 46MB includes exercises of powers as well as the functions of the National Children's Commissioner (the Children's Commissioner). This amendment is consequential to the amendments by Item 25 to include a discretionary power to report to the Minister.

Item 24 Paragraph 46MB(1)(a)

80. This item repeals paragraph 46MB(1)(a) which requires the Children's Commissioner to submit a mandatory annual statutory report to the Minister relating to the enjoyment and exercise of human rights by children in Australia. Item 25 inserts discretion for the Children's Commissioner to produce such a report when he or she sees fit.

Item 25 Subsections 46MB(3) and (3A)

81. This item inserts discretion for the Children's Commissioner to submit reports to the Minister relating to the enjoyment and exercise of human rights by children in Australia. This replaces the mandatory duty to report under paragraph 46MB(1)(a) which is repealed by Item 24.

82. New subsections 46MB(3) and (3A) retain the requirements for such a report as contained in subsection 46MB(3). Subsection 46MB(3A) ensures that discretionary reports may include recommendations as to the action that should be taken. There is no requirement that these reports contain recommendations.

83. The requirement to table these reports under section 46MN will be maintained.

Item 26 Subsections 46MB(4), (5) and (6)

84. This item is consequential to the introduction of discretion to report to the Minister by Item 25.

85. This amendment will ensure that Children’s Commissioner, in exercising his or her powers to submit a discretionary report has the same consultative powers, human rights jurisdiction and discretion to give particular attention to children who are at risk or vulnerable as the Children’s Commissioner has in relation to mandatory reports under paragraph 46MB(1)(a).

Item 27 Subsections 46P(1), (1A) and (1B)

86. Section 46P of the AHRC Act sets out the requirements for lodging a complaint with the Commission. The current section sets a low threshold for lodging a complaint. A bare allegation that unlawful discrimination has occurred—even if it does not contain any particulars of alleged conduct—is sufficient to meet the threshold for lodging a complaint.

87. This item will increase the threshold for lodging complaints with the Commission by replacing the existing requirement under subsection 46P(1) of the AHRC Act.

88. This item sets out the requirements of a complaint. It must be in writing, allege that certain conduct (one or more acts, omissions or practices) has occurred and allege that the conduct is unlawful discrimination.

89. This item also provides that it must be ‘reasonably arguable’ that the alleged conduct is unlawful discrimination. These requirements will ensure that complaints contain more than bare allegations and sufficiently substantiate why alleged conduct is unlawful discrimination. To be a valid complaint under section 46P, a complaint must allege conduct that, if true, would constitute unlawful discrimination.

90. Increasing the threshold for complaints will implement recommendation 9 of the PJCHR report. The PJCHR accepted concerns expressed by submitters and witnesses to the inquiry that the current low threshold encourages lodgement of complaints that are ultimately deemed to be trivial or vexatious.

91. The higher threshold will give the Commission greater discretion to make an initial assessment and dismiss complaints that are unmeritorious at any earlier time. This will help avoid protracted complaints processes.

92. Dealing with unmeritorious complaints is an inefficient use of the time and resources of the complainant and respondent, the Commission, and in some cases, the courts. The anticipated reduction in the volume of complaints the Commission is required to process will

allow the Commission to operate more efficiently and reduce the regulatory burden of the AHRC Act.

Items 28, 32, 33, 35, 38 and 40

93. Consistent with items 1 and 2, these items replace references to ‘alleged unlawful discrimination’ (or ‘unlawful discrimination’) with ‘alleged acts, omissions or practices’ (or ‘acts, omissions or practices’). These drafting changes will make the AHRC Act clearer and address repetitive language.

Item 29 Subsection 46PC(1)

94. This item is consequential to Item 31 which includes an additional mandatory ground of termination of complaints in subsection 46PF(1).

95. This item will ensure that a class member may, by notice in writing to the Commission, withdraw from a representative complaint at any time before the President terminates the complaint under section 46PF(1).

Item 30 Subsection 46PE(3)

96. This item is consequential to Item 47, which includes a new subsection 46PH(2A).

97. This item will ensure that if the President terminates a complaint against a member of the Commission (under subsection 46PE(2)), the President must notify the complainant in writing of that decision and the reasons for that decision (under subsection 46PH(2)). The notification must include a statement explaining that the Federal Court or the Federal Circuit Court can award costs in proceedings under section 46PO.

Item 31 Subsection 46PF(1)

98. When a complaint is made to the Commission (under section 46P of the AHRC Act), the Commission must refer the complaint to the President (section 46PD). Under Subsection 46PF(1) of the AHRC Act, the President must inquire into the complaint and attempt to conciliate the complaint. When the President inquires into or conciliates a complaint, the President is expected to observe the principles of natural justice.

99. This item substitutes a new subsection (1) which will clarify that the President must consider whether a complaint should be terminated under the grounds of termination in section 46PH of the AHRC Act before starting to inquire into a complaint.

100. The President must terminate the complaint without inquiry if the President is of the opinion that, having regard to any of the matters in section 46PH, the complaint should be terminated.

101. This obligation will ensure that unmeritorious complaints are terminated at an early stage and do not impose a burden on potential respondents or the Commission.

102. This item will introduce new subsection (1A), which clarifies that the President may inform himself or herself of such facts and circumstances as are necessary to form the opinion to terminate complaints in paragraph 46PF(1)(b). This is necessary in order to ensure that a decision by the President to terminate a complaint without inquiry, is nevertheless

based upon relevant facts and circumstances, notwithstanding that no inquiry has been commenced.

103. This item will also introduce subsection (1B), which requires the President to comply with notification requirements under subsections 46PH(2), (2A) and (3).

Item 34 Subsection 46PF(4)

104. This item is consequential to Item 31, which includes an additional mandatory ground of termination of complaints in subsection 46PF(1).

105. This item ensures that a complaint cannot be amended after it is terminated by the President under paragraph 46PF(1)(b).

Item 36 Subsections 46PF(6)–(10)

106. This item will introduce principles applicable to the President's handling of complaints of unlawful discrimination. Although natural justice already applies to the President's handling of complaints at all stages, these principles make the President's obligation to act fairly to all parties and to act expeditiously clear on the face of the AHRC Act.

107. New subsection 46PF(6) will oblige the President to act fairly to the complainant (or complainants) and the respondent (noting the definition of 'respondent' in section 3 of the AHRC Act can include more than one person) in the course of inquiring into and attempting to conciliate a complaint. This will include an obligation on the President not to favour the complainant (or complainants) or respondent, in light of the overall requirements of the AHRC Act. The obligation to act fairly concerns the fairness of the procedures adopted by the President, not the fairness of the outcome of a complaint. The requirement to act fairly includes offering reasonable assistance to complainants and respondents. An example of such assistance would be helping a person with disability to transcribe information. It is not intended to extend to the provision of legal advice.

108. New subsections 46PF(7) and 46PF(8) will require the President to notify the respondent to a complaint, including where a new respondent is added at a later stage through an amendment to a complaint. There may be more than one respondent to a complaint (section 3 of the AHRC Act defines 'respondent', in relation to a complaint, as the person or persons against whom the complaint is made).

109. New subsections 46PF(7) and 46PF(8) are directed at complaints involving more than one respondent. The obligation on the President created by these subsections is intended to ensure timely notification of respondents, to provide them with a fair opportunity to respond to allegations made against them. For example, a complaint may be made to the Commission against an organisation based on the alleged conduct of several of the organisation's employees, as well as against the employees individually. New subsections 46PF(7) and 46PF(8) will ensure that where there are multiple respondents to a complaint, each respondent is notified of the complaint in a timely manner, and to the extent possible, at the same time.

110. New subsection 46PF(9) requires the President to notify the complaint to any person (other than the respondent) who is the subject of a specific allegation in the complaint. A

respondent to a complaint of unlawful discrimination may be subject to legal action in the courts if the complaint is terminated. However, a person who is the subject of an adverse allegation, but is not a respondent to a complaint, is not subject to legal action. Nevertheless, such a person may suffer reputational harm if allegations are made against them. They are entitled to know of the fact that the allegations have been made and, if they choose to do so, to challenge them. To enable them to do so, it is appropriate for the President to notify these persons as their alleged conduct may be the source of the complaint.

111. New subsection 46PF(9) also provides the President with an additional power to notify persons who are likely to be able to provide information relevant to the complaint of the existence of a complaint. These persons may not necessarily be respondents to a complaint, but may have knowledge of conduct that is alleged in the complaint, or other relevant information.

112. New subsection 46PF(10) requires the President to act expeditiously when dealing with complaints, and to use best endeavours to finish dealing with complaints within 12 months after the complaint is referred to the President. In acting expeditiously, the President is required to have regard to the nature of the complaint, and the needs of the complainant (or complainants) and the respondent. Most complaints are finalised by the Commission within a short period. Nevertheless, this subsection provides a clear legislative imperative for the President to continue to ensure that complaints are finalised quickly, and avoid protracted processes on complainants and respondents.

113. The requirements inserted by this item are similar to those in Items 10 and 15 in relation to the Commission's human rights and equal opportunity in employment functions.

114. This item will implement PJCHR recommendations 5, 6 and 7.

Item 37 Heading before subsection 46PH(1)

115. This item inserts a heading to indicate the grounds for discretionary termination of a complaint by the President.

Item 39 Paragraph 46PH(1)(b)

116. Paragraph 46PH(1)(b) currently provides that the President may terminate a complaint if the complaint was lodged more than 12 months after the alleged unlawful discrimination took place.

117. This item reduces the time limit to 6 months. This reduction will provide a strong incentive for complainants to lodge complaints in a timely manner following the occurrence of conduct alleged to be unlawful discrimination.

118. The reduction will also give the President additional flexibility to terminate complaints that are lodged a significant time after alleged conduct took place for a potentially vexatious or other unmeritorious purpose. This will also reduce the burden on potential respondents.

Item 41 Paragraph 46PH(1)(c)

119. Under existing paragraph 46PH(1)(c), the President has discretion to terminate a complaint if the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance. However, once the President has arrived at that view, there is no reason why the complaint should not be terminated at that stage. Therefore, it is not appropriate that the President should still have discretion whether or not to terminate the complaint: once the conclusion termination on this ground the complaint should be terminated forthwith. This ground will therefore be a mandatory ground of termination in new subsection 46PH(1B).

120. This item repeals the existing ground under paragraph 46PH(1)(c), and substitutes a new paragraph 46PH(1)(c) providing a new discretionary ground for the termination of a complaint where the President is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted.

121. The new discretionary ground of termination will provide the President with additionally flexibility to terminate unmeritorious complaints or complaints which should otherwise not proceed. This will reduce the burden on potential respondents.

122. This item will implement PJCHR recommendation 12.

Item 42 Note

123. This item inserts a note after the grounds of termination in section 46PH. The note makes clear that consideration of whether an act, omission or practice is unlawful discrimination will involve consideration of whether an exemption applies. For example, if an exemption in section 18D of the RDA applies to conduct that would otherwise contravene section 18C, that conduct would not be unlawful discrimination.

Item 43 Subsections 46PH(1A) – (1D)

124. This item:

- inserts new subsections 46PH(1A) and 46PH(1D), which clarify that the President’s power to terminate complaints under the discretionary and mandatory grounds may be exercised at any time, even if an inquiry into the complaint has begun
- inserts new subsection 46PH(1B), which provides a new mandatory ground for the termination of a complaint where the President is satisfied the complaint is trivial, vexatious, misconceived, or lacking in substance; or there is no reasonable prospect that the complaint will be resolved in favour of the complainant or complainants, and
- inserts new subsection 46PH(1C), which provides a new mandatory ground for the termination of a complaint where the President is satisfied there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.

125. New subsections 46PH(1A) and 46PH(1D) clarify that the grounds of termination may be exercised by the President at any time, including at an early stage.

126. Under the mandatory grounds of termination, the President *must* terminate a complaint. The mandatory grounds are targeted at unmeritorious complaints. They oblige the President to terminate unmeritorious complaints at an early stage, and provide a stronger disincentive against lodgement of such complaints. The requirement that the President terminate such complaints will reduce, in some cases significantly, the burden on potential respondents.

127. New subsection 46PH(1B) reproduces the existing ground in paragraph 46PH(1)(c) as a mandatory ground of termination. It also introduces an additional element requiring the President to terminate a complaint if the President is satisfied there is no reasonable prospect that the complaint will be resolved in favour of the complainant or complainants. This imports into the complaint proceeding a test similar to that applied by the Courts in dismissing an action summarily ('no reasonable prospect of success').

128. New subsection 46PH(1C) introduces a new mandatory ground for the termination of a complaint where the President is satisfied there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.

129. New subsection 46PH(1C) concerns the *substance* of a complaint. In considering whether there would be no reasonable prospect of success in the Federal Court or Federal Circuit Court, the President would assume that the procedural steps prior to the court hearing the case, including those under section 46PO of the AHRC Act, had occurred. These steps include:

- the complaint has been terminated
- notice of the termination has been given, and
- the court concerned has granted leave to make the application.

130. The fact that the grounds of termination in new subsections 46PH(1B) and 46PH(1C) are mandatory does not affect the ability for a person to make an application to the Federal Court or Federal Circuit Court under section 46PO of the AHRC Act. However, this is subject to the new requirement that the court grants leave to make the application (see Item 53). This reflects the fact that the Commission's complaint-handling function is not a judicial function, and that recourse to the courts should be exceptional. It is for the courts therefore to determine whether grounds exist or not to grant leave. An example of a ground to grant leave might be if the President, in conducting the complaint process, had made an error of law.

131. Respondents to a complaint may write to the President at any time to request that the President exercise his or her power to terminate a complaint under any of the grounds in section 46PH.

132. This item also inserts a heading to indicate the grounds for mandatory termination of a complaint by the President.

133. This item will implement PJCHR recommendations 13, 15 and 16.

Item 44 Heading before subsection 46PH(2)

134. This item inserts a heading to indicate that subsections 46PH(2) and 46PH(3) relate to notification of termination of a complaint.

Item 45 Subsection 46PH(2)

135. This item omits ‘decides to terminate a complaint’ and substitutes ‘terminates a complaint’ from subsection 46PH(2).

136. A more generalised reference is necessary because this Bill introduces new mandatory grounds of termination of complaints (in addition to the existing discretionary grounds). Under the new mandatory grounds of termination, the President does not *decide* to terminate a complaint—the President is obligated to terminate.

Item 46 Subsection 46PH(2)

137. This item is consequential to Item 31 which includes an additional mandatory ground of termination of complaints in subsection 46PF(1).

138. This item omits references to ‘that decision’ (wherever occurring) and substitutes ‘the termination’. This will ensure that the requirement the President notifies a complainant of a decision to terminate a complaint also applies in relation to subsection 46PF(1).

Item 47 Subsection 46PH(2A)

139. This item inserts a new provision which requires the President to include a statement noting the costs jurisdiction of the Federal Court and the Federal Circuit Court in a notice of termination under subsection 46PH(2).

140. Such a statement is not intended to be an exhaustive overview of the Federal Court and the Federal Circuit Court’s costs jurisdiction. The purpose of this amendment is to ensure that complainants are explicitly made aware that if they pursue their complaint in the Federal Court or the Federal Circuit Court that they may be subject to an adverse costs order.

141. This item will implement recommendation 19 of the PJCHR Report.

Item 48 Heading before subsection 46PH(4)

142. This item inserts a heading to indicate that subsection 46PH(4) relates to revocation of termination of a complaint.

Item 49 Sections 46PJ, 46PK and 46PKA

143. This item replaces sections 46PJ and 46PK to broaden the application of legislative proscriptions regarding compulsory conciliation conferences to include voluntary conciliation conferences.

144. The Commission may hold both voluntary and compulsory conferences. However, the AHRC Act only regulates the holding of compulsory conferences, despite such conferences

being very rarely conducted by the Commission. This item will ensure that procedures surrounding voluntary conferences are also proscribed, providing certainty to complainants and respondents during the conciliation of a complaint.

145. Subsection 46PJ(1) provides that the President may decide to hold a conference for the purposes of conciliating an unlawful discrimination complaint.

146. Subsection 46PJ(2) allows the President to invite any or all of the complainants or respondents to attend the conference, and invite any other person to attend the conference if the President reasonably believes the person is capable of giving information that is relevant to the complaint, or if the President considers that the person's presence is likely to be conducive to the conciliation of a complaint.

147. This subsection may be used, for example, where the respondent to a complaint is an employer who is vicariously liable for the conduct of their employees. Where the employee who did the relevant act is not the respondent to the complaint, but may be able to give such information or assist in conciliating the complaint, the President may invite him or her to attend under paragraph 46J(2)(b).

148. Subsections 46PJ(3)–(6) set out the provisions for a compulsory conference, providing a distinction between the Commission inviting a person to attend a conference and the Commission compelling a person to attend a conference. Subsection (3) provides that the Commission may require people to attend a conference by written notice. Notices requiring attendance at a conference must specify the time and the place of the conference, not being a time that is less than 14 days after the notice has been given, and the Commission must pay the reasonable costs for a person's attendance where this has been required.

149. Failure to comply with a notice from the Commission requiring attendance at a conference under subsection (3) is an offence under subsection (5). This replicates section 46PL, which is repealed by Item 50.

150. Subsection (6) specifies that an offence under subsection (5) is an offence of strict liability. The general defences under the Criminal Code apply to an offence under subsection (5). For example, if a person who is given notice to attend a compulsory conference in person cannot attend the conference because an earthquake occurs in Sydney at the time of the conference, that person could rely upon the defence of sudden or extraordinary emergency under Division 10 of the Criminal Code.

151. Subsection (7) provides that a person required to attend a compulsory conference is entitled to be paid a reasonable sum for their expenses of attendance. This may include, for example, reimbursement of reasonable transport costs.

152. Section 46PK provides that the Commission is able to conduct conciliation conferences in such a manner as the Commission considers appropriate. This will ensure that, aside from the minimal formal requirements, the person presiding retains the maximum degree of flexibility possible in relation to the conduct of a conference.

153. Subsections (2) and (3) provide that the conference must be held in private and the person presiding over the conference must take all reasonable steps to ensure that neither complainants nor respondents are disadvantaged.

154. Subsection (4) outlines whether and how an individual or body is able to be represented at a conference. For example, if a business were a respondent to a complaint, it would need to be represented by an officer or employee of the business at the conference. If the business wished to be represented by another person or body, the business would need to seek the consent of the person presiding at the conference.

155. Subsection (5) provides that despite the requirements of subsection (4), if an individual is unable to attend the conference because of their disability, they are able to nominate a person to attend on their behalf. Subsection (6) provides that if an individual with a disability is unable to fully participate in the conference, they are able to nominate a person to assist them at the conference.

156. Subsection (7) makes it clear that the term ‘disability’ in this section has the same meaning as in the DDA.

157. Section 46PKA provides that anything said or done in the course of conciliation is not admissible in evidence in any proceedings relating to the alleged acts, omissions or practices. For example, evidence of anything said or done in the course of conciliation of a disability discrimination complaint would not be admissible in evidence in later proceedings, such as proceedings under section 46PO in relation to the DDA or any other proceedings arising out of the same subject matter, such as a tort or contract claim.

158. Subsection 46PKA(1) carves out an exception for an application made under section 46PSA under Item 30A. This means that, where a respondent in conciliation makes an offer to settle the complaint to the complainant, and that offer is rejected, the respondent is not barred by section 46PKA from bringing evidence of that offer in determining whether the court should award costs against the complainant under section 46PSA.

Item 50 Section 46PL

159. This item will repeal section 46PL. This repeal is a consequential amendment due to the creation of a strict liability offence for failure to comply with a notice from the Commission requiring attendance at a conference by Item 49.

Item 51 Subsection 46PM(1)

160. This item will remove redundant references to sections 46PJ and 46PK in subsection 46PM(1).

161. Subsection 46PM(1) creates a penalty when a person refuses or fails to give information or to produce a document when so required under section 46PI or 46PK. Sections 46PJ and 46PK as amended no longer require a person to give information or produce a document.

Item 52 Paragraph 46PO(1)(a)

162. Section 46PO of the AHRC Act provides that if a complaint has been terminated under section 46PH, a person may make an application to the Federal Court or the Federal Circuit Court.

163. This item will ensure that a person may make an application to the Federal Court or Federal Circuit Court in relation to a complaint that is terminated under the new ground of termination in paragraph 46PF(1)(b).

Item 53 Subsection 46PO(3A)

164. This item inserts new subsection 46PO(3A), which provides that an application to the Federal Court or Federal Circuit Court must not be made unless the court grants leave to make the application, or unless a complaint was terminated under paragraph 46PH(1)(h) of the AHRC Act.

165. Such a complaint is terminated if the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court. These matters should not require leave to make an application to the court.

166. This item will implement PJCHR recommendation 18.

Item 54 Notes at the end of subsection 46PO(4)

167. This item inserts two notes at the end of subsection 46PO(4) to clarify the costs jurisdiction of the Federal Court and the Federal Circuit Court. The Federal Court and Federal Circuit Court have general jurisdiction to award costs in the discretion of the Court, in accordance with section 43 of the *Federal Court Act 1976* and section 79 of the *Federal Circuit Court Act 1999*.

168. Although the Courts already have jurisdiction to make costs orders against applicants in cases where there were no reasonable prospects of success, this amendment makes it clear on the face of the AHRC Act that an applicant may be subject to a costs order by pursuing an application in the Federal Court or the Federal Circuit Court under section 46PO.

169. This item will implement PJCHR recommendation 19.

Item 55 Subsection 46PP(3)

170. This item is consequential to Item 31 which includes an additional mandatory ground of termination of complaints in subsection 46PF(1).

171. Section 46PP of the AHRC Act provides that the Federal Court or the Federal Circuit Court may grant an interim injunction to maintain the status quo or the rights of any complainant, respondent or affected person at any time after a complaint is lodged with the Commission.

172. This item will ensure that an injunction under section 46PP cannot be granted if the complaint has been terminated under paragraph 46PF(1).

Item 56 Subsection 46PS(1)

173. This item is consequential to Item 31 which includes an additional mandatory ground of termination of complaints in subsection 46PF(1).

174. Section 46PS of the AHRC Act provides that the President may provide the Federal Court or Federal Circuit Court with a written report on a complaint that has been terminated under section 46PH.

175. This item will ensure that the President may also provide the court with a written report on a complaint that has been terminated under subsection 46PF(1).

Item 57 Section 46PSA

176. This item will insert a provision which clarifies that the court may, in exercising its discretion to award costs in an unlawful discrimination proceeding, consider previous rejected offers to settle the matter.

177. For example, if in the course of conciliation, the respondent offered a monetary settlement and the court ultimately upheld the application and ordered the respondent to pay damages, the court could consider that offer in determining whether to award costs in the proceedings against the applicant. Alternatively, if the court dismissed the case, the court could consider the respondent's previous offers to settle.

178. This item is intended to discourage clearly unmeritorious complaints from progressing to court. It is intended to deter recourse to the court where earlier settlement offers have been made that may reasonably be regarded as equivalent to the remedy that the court has ultimately offered.

Item 58 Application of amendments

179. Clause (1) provides for the application of amendments made by Items 6, 11, 12 and 16. These replace the mandatory duty to report to the Minister with discretion to report to the Minister regarding human rights inquiries and equal opportunity in employment inquiries. Where an inquiry is in response to a complaint, the amendments apply to complaints made after the commencement of the Act (the day after Royal Assent). Where an inquiry is own-motion or has been requested by the Minister, the amendments apply to inquiries which began after the commencement of the Act.

180. Clause (2) provides for the application of amendments made by Items 1, 27–38 and 40–51. These amendments relate to the threshold of a complaint, the President's obligation to consider termination prior to inquiry and the President's duty to act fairly and expeditiously. These amendments also relate to the new grounds of termination, including the mandatory duty to termination, and the proscriptions regarding voluntary and compulsory conciliation conferences. These amendments apply in relation to a complaint lodged after the commencement of the Act (the day after Royal Assent).

181. Clause (3) provides for the application of amendments made by Items 9 and 14 relating to new grounds of termination for inquiries arising out of human rights and equal opportunity in employment complaints. These amendments will apply to complaints made after the commencement of the Act (the day after Royal Assent).

182. Clause (4) provides for the application of subsection 20(9) as amended by the Act. This amendment introduces an obligation for the Commission to act fairly in the performance of a human rights inquiry. Where an inquiry is in response to a complaint, the amendments apply to complaints made after the commencement of the Act. Where an inquiry is

own-motion or has been requested by the Minister, the amendments apply to inquiries which began after the commencement of the Act (the day after Royal Assent).

183. Clause (5) provides for the application of subsection 32(4) as amended by the Act. This amendment introduces an obligation for the Commission to act fairly in the performance of an equal opportunity in employment inquiry. Where an inquiry is in response to a complaint, the amendments apply to complaints made after the commencement of the Act. Where an inquiry is own-motion or has been requested by the Minister, the amendments apply to inquiries which began after the commencement of the Act (the day after Royal Assent).

184. Clause (6) provides for the application of subsection 20(10) as amended by the Act. This amendment introduces an obligation for the Commission to act expeditiously in dealing with a human rights complaint and use its best endeavours to finish dealing with the complaint within 12 months. This amendment applies to a complaint made after the commencement of the Act (the day after Royal Assent).

185. Clause (7) provides for the application of subsection 32(5) as amended by the Act. This amendment introduces an obligation for the Commission to act expeditiously in dealing with an equal opportunity in employment complaint and use its best endeavours to finish dealing with the complaint within 12 months. This amendment applies to a complaint made after the commencement of the Act (the day after Royal Assent).

186. Clause (8) provides for the application of amendments made by Item 39. Item 39 allows the Commission to terminate a complaint if it was lodged more than six months after the alleged acts, omissions or practices, took place. This amendment applies to a complaint lodged after the commencement of the Act if the alleged acts, omissions or practices took place after the commencement of the Act (the day after Royal Assent).

187. Clause (9) provides for the application of amendments made by Items 52, 53 and 57. These amendments introduce a requirement to seek leave of the Federal Court or Federal Circuit Court and allow the court, or a judge of the court, to consider settlement offers in deciding whether to award costs. These amendments apply in relation to an application made to the Federal Court or the Federal Circuit Court under section 46PO of the AHRC Act if the relevant complaint was lodged after the commencement of the Act (the day after Royal Assent).

Item 59 Transitional – tabling of reports

188. This item ensures that if the Minister receives the annual report by the Social Justice Commissioner under paragraph 46C(1)(a) prior to the commencement of this Act, that report may still be tabled in Parliament as if section 46M had not been amended by Item 22 to remove reference to paragraph 46C(1)(a).

Schedule 3 – Amendment of the Native Title Act 1993

Native Title Act 1993

Item 1 Section 209

189. This item repeals subsection 209(1) which requires the Social Justice Commissioner to submit a mandatory annual statutory report to the Minister relating to the operation of the *Native Title Act 1993* and the effect of the *Native Title Act* on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders. Item 11 of Schedule 2 inserts discretion for the Social Justice Commissioner to produce such a report when he or she sees fit.

190. This item retains the ability of the Minister to direct the Social Justice Commissioner to report to the Minister regarding the operation of the *Native Title Act* and the effect of the *Native Title Act* on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.