

20 February 2017

Mr Ian Goodenough MP  
Chair  
Parliamentary Joint Committee on Human Rights  
Parliament House  
CANBERRA ACT 2600

By email: [18Cinquiry@aph.gov.au](mailto:18Cinquiry@aph.gov.au)

Dear Mr Goodenough

**Inquiry into Freedom of Speech in Australia**

I refer to the transcript of the Parliamentary Joint Committee on Human Rights' Freedom of Speech in Australia Inquiry hearing on 1 February 2017. At page 12, in response to Senator Reynolds' I said I was happy to speak to the Senator or prepare a further submission. This was said in the context of Senator Reynolds' concern (page 11) that 'the procedure as it was supposed to be in the legislation was not followed' in *Prior v Queensland University of Technology & Ors* (No.2) [2016] FCCA 2853.

As I indicated at the hearing on 1 February 2017 I have no involvement in the *Prior* matter and I am not privy to any information relevant to the Australian Human Rights Commission's (AHRC) handling of the complaint. I make no comment on that matter.

In response to the requirements of the *Australian Human Rights Commission Act* 1986 (Cth), I make the following brief points.

First, there is no statutory obligation on the AHRC to inform a person identified in a complaint lodged under s 46P of the *Australian Human Rights Commission Act*. For the purpose of s 46P of the AHRC there is no onus on the complainant to name a respondent. The complainant may not know the specific identity of the respondent and that may be a matter that requires some further investigation

Secondly, the AHRC refers the complaint to the President (s 46PD of the *Australian Human Rights Commission Act*). The President's obligation is to inquire into the complaint and attempt to conciliate the complaint. The President is then to determine when and on what grounds the complaint should be terminated. The President is not required to notify a person about whom a complaint is made or a person referred to in a complaint. Obviously, if the President seeks to conduct an inquiry which requires a response from a person, then a respondent will be notified of the complaint and provided with the opportunity to respond.

Thirdly, from a practical perspective and to ensure the proper working of the *Australian Human Rights Commission Act*, by the time a complaint comes to be terminated by the President, the respondents need to be identified.

Section 46PO(1) the AHRC Act provides that if a complaint has been terminated by the President:

*...any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Circuit Court, alleging unlawful discrimination **by one or more of the respondents to the terminated complaint.***

(Emphasis added)

The term “*respondent, in relation to a complaint*” is defined in s 3 of the *Australian Human Rights Commission Act* to mean “*the person or persons against whom the complaint is made.*”

In a number of cases the Federal Court has said that an application to the Court may **only** be brought against the respondents identified in the complaint terminated by the President.<sup>1</sup>

In *Eliezer v University of Sydney* [2015] FCA 1045 at [47] and [51], Justice Perry said:

[47] ... the Full Court [in *Grigor-Scott v Jones* (2008) 168 FCR 450] held that s 46PO(1) does limit the Court’s jurisdiction to entertain proceedings to those instituted against respondents only to the terminated complaint. It follows that it is not therefore correct to say that the identity of a respondent is a mere technicality with which the Court can dispense by reason of s 46PR of the AHRC Act.

and

[51] ... the Full Court’s reasons in *Grigor-Scott* also makes it clear it is not sufficient that an individual is implicated in the conduct of which complaint is made to the Commission in order to establish that she or he is a respondent’.

The Federal Court’s rulings highlight the importance of the identifying the correct respondent during the AHRC complaint handling phase. It is clear that simply naming a person in a complaint will not be sufficient to make the person a respondent. Accordingly, it may be premature to notify persons of a complaint before it is clear that the person is in fact a proper respondent.

Yours sincerely

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<sup>1</sup> see *Grigor-Scott v Jones* (2008) 168 FCR 450 *Lawrance v The Commonwealth Of Australia & Ors* [2006] FMCA 1792, *Bahonko v Sterjov* [2007] FCA 359 at [36]; *L v Commonwealth of Australia* [2009] FCA 4; *Ioannou v Hellenic Club Community Aged Care* [2012] FCA 1227 at [17]; *O'Donoghue v State of Western Australia* [2013] FCA 903 at [22-24]; *Mathews v Statement of Queensland* [2014] FCA 1280; *Picos v Servcorp Ltd* [2015] FCA 344 at [5]-[6], [48]-[49] and [56] and *Eliezer v University of Sydney* [2015] FCA 1045).