

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

Group: 2

Program: Other Agency

Question No. AE15/106

Senator O'Sullivan asked the following question at the hearing on 27 March 2015:

Senator O'SULLIVAN: Professor, I want to set a platform question before I go to the heart of my inquiry. Are you familiar with a case handled by the commission referred to as MG v the Commonwealth?

Prof. Triggs: Yes. That is one of the many complaints that we have received.

Senator O'SULLIVAN: You are familiar, clearly, from the exchange of evidence, with the Basikbasik case. There is another one referred to as Mr Charlie. Are you familiar with that particular matter also?

Prof. Triggs: Yes, again, I am familiar with that case, but I would have to refresh my mind as to the precise detail.

Senator O'SULLIVAN: No, I do not intend to ask you any questions about it today, but we will get to that, no doubt. Professor, the Senate provides for us to ask a witness to produce documents relevant to the work of the committee. I am now about to ask you about, or give you notice of a request about, the production of documents. When I say 'the production of documents', I am looking for the entire working file held by the commission in relation to these three matters. It would include but not be limited to documents; copies of anything held electronically, to the extent it could be produced; records; photographs; exhibits, if that is an appropriate term, that are presented; transcripts; records of depositions—any physical thing that can be transported within the scope of that request. So I am making a request of you to produce these documents in those three cases.

Prof. Triggs: We will be very happy to take the request on notice and we will, of course, get back to the committee.

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

The Commission makes a public interest immunity claim in relation to these documents to the extent that they fall within the categories described in more detail below. The public interest immunity claim is made on four grounds:

1. The documents fall within the secrecy provisions in section 49 of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

2. Disclosure of the documents would have a substantial adverse effect on the proper and efficient conduct of the operation of the Commission.
3. Disclosure of the documents would amount to a breach of confidence in circumstances where confidentiality is an intrinsic aspect of the relevant function of the Commission.
4. Disclosure of the documents would unreasonably affect a person's privacy.

We will set out these grounds for the public interest claim first, before addressing the harm to the public interest that could result from the disclosure of the documents.

The Commission has been requested to produce all documents that relate to the human rights complaints made to the Commission by MG, Mr Basikbasik and Mr Charlie pursuant to section 11(1)(f) and section 20(1)(b) of the AHRC Act. These documents fall within the following broad categories:

- the complaint made by the individual to the Commission;
- documents relating to the investigation of the complaint;
- documents relating to attempts to conciliate the complaint;
- legal advice to the President as to whether there has been a breach of human rights.

Documents falling within the last of these categories are subject to legal professional privilege.

Some of the documents contained on the file, for example documents that are already in the public domain, will not be covered by the public interest immunity claim made by the Commission. If the Committee confirms that it would like production of documents not falling within the public interest immunity claim as described in this answer, the Commission would be happy to provide them.

Secrecy provisions

The documents relate to the 'affairs of another person' (namely, the individual complainants) and fall within the secrecy provisions in section 49 of the AHRC Act. Section 49 relevantly provides:

(2) A person who is, or has at any time been, a member of the Commission or a member of the staff referred to in section 43 or is acting, or has at any time acted, for or on behalf of the Commission shall not be required:

(a) to divulge or communicate to a court any information relating to the affairs of another person acquired by the first-mentioned person by reason of that person's office or employment under or for the purposes of this Act or by reason of that person acting, or having acted, for or on behalf of the Commission; or

(b) to produce in a court a document relating to the affairs of another person of which the first-mentioned person has custody, or to which that person has access, by reason of that person's office or employment under or for the purposes of this Act or by reason of that person acting, or having acted, for or on behalf of the Commission;

except where it is necessary to do so for the purposes of this Act.

...

(5) In this section:

court includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

produce includes permit access to.

Section 49 of the AHRC Act would ordinarily prevent members of the Commission or Commission staff from being compelled by a court, authority or person to disclose the documents the subject of this request. By enacting section 49, Parliament has determined that it is not appropriate for documents of this type to be made public.

In *McMillan v Director-General of Communities NSW* [2009] NSWSC 1236 at [261], Justice Hall in the Supreme Court of New South Wales said that legislative provisions such as section 49 are designed ‘to ensure that information acquired by a government agency is used only for the purposes of that agency’.

His Honour made reference to the judgment of Justice Pagone (then a judge of the Supreme Court of Victoria and now a judge of the Federal Court of Australia) in *Australia and New Zealand Banking Group Ltd v Nguyen* [2002] VSC 69 that secrecy provisions of this kind:

reflect an important and fundamental public policy. The policy seeks to balance (a) the importance of the free flow of information to those authorised to receive it, or empowered to require it, with (b) the secrecy and confidentiality of that information being maintained. Indeed, the latter may be seen as facilitating the former because it is the certainty of the secrecy that encourages the supply of full and accurate information.

People who disclose their affairs to the Commission in the course of making or responding to a complaint are entitled to do so on the basis that these disclosures will be protected by the secrecy provision in section 49.

The Commission submits that it is not in the public interest to depart from this principle, including because of the adverse effect that this would have on the proper and efficient conduct of the operation of the Commission, the fact that it would involve breaches of confidence, the unreasonable impact it would have on the privacy of those dealing with the Commission and the detrimental effect it would have on the administration of justice in relation to breaches of human rights more generally.

Substantial adverse effect on the proper and efficient conduct of the operation of the Commission

Disclosure of the documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission.

Two of the major functions of the Commission are to:

- inquire into, and attempt to conciliate, complaints in relation to unlawful discrimination and breaches of human rights (complaint function); and
- to promote an understanding and acceptance, and the public discussion, of human rights and equality of opportunity and treatment in employment and occupation in Australia (educative function).

The Commission considers privacy and confidentiality to be a fundamental requirement of the successful operation of its complaint function.

Privacy and confidentiality encourages voluntary participation in the complaint process and allows the parties to:

- engage meaningfully in conciliation;
- have frank and honest discussions and come up with creative solutions to the issues;
- reach agreement in relation to longer term educative and systemic responses to discrimination and breaches of human rights;
- voluntarily provide information and documents so that the Commission does not have to rely on its powers to compel production (and incur the associated costs in seeking the enforcement of any Notice);
- resolve complaints without the need to report to Parliament or go to court.

Complainants are aware that when complaints are lodged they will be treated with total confidentiality by the Commission. That removes the potential deterrent of adverse publicity, which might otherwise deter complainants from approaching the Commission.

Representations are also made to respondents that any information and documents provided as part of the complaint process will not be disclosed, save as required by law.

For many respondents, participation in the complaint function is the only exposure that they have to discrimination and human rights and it is therefore a key opportunity for the Commission to increase understanding and encourage respondents to undertake training and make policy changes to enhance human rights understanding and protections.

That confidentiality is an important aspect of the complaint function is clear from the AHRC Act. For instance, under s 46PS of that Act, the President cannot include details of anything said or done in the course of conciliation proceedings in any report provided to a court under that section. Under s 49 of the Act, staff of the Commission must not divulge information about persons gathered in the course of the Commission exercising its functions, save to the extent required by law. And, s 49(2) provides that members of the Commission or Commission staff cannot be compelled to produce such information or documents in Court.

To now disclose the documents requested could reasonably be expected to substantially affect:

- the willingness of individuals to make complaints to the Commission;
- the willingness of respondents to produce documents and information voluntarily; and

- the willingness of both parties to participate honestly and frankly in conciliation, or to participate in conciliation at all.

This would in turn significantly reduce the number of complaints that are resolved and reduce the opportunity to use the complaint process to promote an understanding and acceptance, and the public discussion, of human rights and equality of opportunity and treatment in employment and occupation in Australia.

It would also mean an increase in the number of complainants that will be required to take their matters to court in order to have them resolved (so far as this option is available to them). This will have significant costs implications for those complainants and will lead to a loss of confidence by complainants in the Commission's ability to protect their rights. It would also increase the burden on the limited resources of the Federal Circuit Court and Federal Court of Australia.

In *Lynch and Human Rights and Equal Opportunity Commission* [1991] AATA 390, the Deputy President of the Administrative Appeals Tribunal considered that disclosure of documents created as part of the Commission's conciliation process would have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission. The Deputy President said:

I do not believe that frank discussions are likely to take place in these circumstances between people and government officials if they believe that the contents of those discussions would be disclosed; after all, the [Sex Discrimination Act 1984 (Cth)] tells them they are not going to be used in court

This decision was upheld by Morling J in the Federal Court of Australia and on appeal by the Full Court of the Federal Court (*Lynch v Human Rights and Equal Opportunity Commission* (1992) 27 ALD 647).

Similar considerations were taken into account by the Administrative Appeals Tribunal in *Re Telstra, Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71. The AAT held that it would be contrary to the public interest to compel disclosure of information under the FOI Act where the release of the information (which had been provided by industry participants) could prejudice the Australian Competition and Consumer Commission's ability to investigate alleged anti-competitive behaviour and its ability to perform its statutory functions. In particular, the AAT referred to the expectations by complainants about future use of information contained in the complaints made to the ACCC, and their willingness to make complaints if they knew that the information provided to the ACCC could be made publicly available.

The decisions described above involved decisions under the *Freedom of Information Act 1982* (Cth). The Commission notes that this Act does not apply to parliamentary inquiries. However, as set out in the Government Guidelines for Official Witnesses before Parliamentary Committees, the exemptions in the FOI Act 'may be considered a general guide to the grounds on which a parliamentary inquiry may reasonably be asked not to press for particular

information'. These decisions are relevant to a full assessment of the public interest claim made by the Commission.

The Commission currently has an extremely high rate of voluntary participation in complaints before it. This is essential to the efficient conduct of the Commission's conciliation and educative functions. Any reduction in voluntary participation would constitute a substantial adverse effect on the Commission's complaint and educative functions.

The Commission also has a high rate of successful conciliation. A reduction in this rate is likely to see a corresponding increase in litigation.

For these reasons, the Commission considers that the disclosure of the documents requested could reasonably be expected to have a substantial adverse effect on the operations of the Commission.

Breach of confidence

The Commission is aware of the Senate Order of 13 May 2009 that committees will not accept a claim for public interest immunity based only on the ground that the document in question has not been published or is confidential.

In the present case, the public interest is engaged because disclosure of the documents would amount to a breach of confidence in circumstances where confidentiality is an intrinsic aspect of the relevant function of the Commission to which these particular documents relate.

This ground is related to, but separate from the ground discussed above about the proper and efficient conduct of the operation of the Commission.

The documents were provided to the Commission by both the complainants and the respondents to the complaints on the understanding that the Commission would not disclose them, save as required by law. Complainants are aware that when complaints are lodged with the Commission they will be treated with total confidentiality by the Commission. Respondents also provide documents during the investigation of complaints and are aware that the Commission will not disclose these documents, except where it is required by law. The Commission makes representations to this effect. Disclosing these particular documents could amount to a breach of those representations.

In this context, a requirement for the disclosure of documents that were provided in confidence would not be in the public interest because of the impact on the integrity of an intrinsic aspect of the Commission's complaint process.

Unreasonable invasion of privacy

Disclosure of the documents would unreasonably affect a person's privacy.

The documents contain the personal information of the individual complainants, MG, Mr Basikbasik and Mr Charlie. MG's identity is apparent from the documents. The Commission submits that disclosure of this personal information is unreasonable for the following reasons.

Many of the documents include sensitive information that the individual complainants would not wish to have disclosed without consent. Many of the documents relate to the individual complainants' period of immigration detention. The documents include, for example, case reviews as well as documents relating to security decisions, visa applications, medical assessments and incident reports. These documents are not publicly available. They are held by the Commonwealth, Department of Immigration and Border Protection, and are subject to their privacy obligations. Individual complainants sign a consent form to allow the Department of Immigration and Border Protection to release documents relevant to their complaint to the Commission. The consent form states:

I understand these documents will be provided to the AHRC for the purposes of its inquiry into my complaint under the *Australian Human Rights Commission Act 1986* (Cth).

I understand that my personal information will be used and stored in accordance with the *Privacy Act 1988* (Cth).

I understand that I can withdraw my consent at any time by contacting my AHRC case officer.

For these reasons, the Commission submits that disclosure of these documents would be an unreasonable invasion of privacy.

The particular privacy considerations in relation to MG are considered in more detail in the Commission's response to question AE15/105.

Harm to the public interest that could result from disclosure

The Commission submits that the harm to the public interest that could result from the disclosure of the documents requested is as follows. Disclosure could reasonably be expected to:

- impede the administration of justice generally;
- impede the Commission's ability to obtain confidential information, and other similar information, in the future;
- unreasonably affect a person's privacy.

On balance, the Commission considers that the public interest in disclosure is outweighed by the public harm that could result from the disclosure of the information requested.

Administration of justice

For the reasons set out above, the Commission considers that the release of the documents requested would impede the willingness of individuals to make complaints to the Commission and the willingness of respondents to voluntarily participate in the complaint process (including importantly, the conciliation process).

This would in turn significantly reduce the number of complaints that are resolved and reduce the opportunity to use the complaint process to promote an understanding and acceptance, and the public discussion, of human rights and equality of opportunity and treatment in employment and occupation in Australia.

It would also mean an increase in the number of complainants that will be required to take their matters to court in order to have them resolved. This will have significant costs implications for both those complainants and the respondents to the complaint. This is often sufficient for a complainant to decide not to proceed to court, which would impede the administration of justice for the complainant.

If a matter does proceed to court, it will impose an additional burden on the courts and thereby impact on the administration of justice generally.

Commission's ability to obtain confidential information in the future

For the reasons set out above, the Commission considers that the release of the documents requested could reasonably be expected to reduce the willingness of future respondents to participate in the complaint process. This would impede the flow of information to the Commission. It would also prejudice the Commission's ability to obtain confidential information, and other similar information, in the future.

The Commission would be required to rely on its powers under section 21 of the AHRC Act to compel the giving of information or the production of documents in relation to a human rights complaint. This imposes an additional administrative burden on the Commission. The Commission may also be required to seek to enforce these section 21 notices in the Federal Court in the event that respondents fail to produce the information or documents requested. This would impose an additional cost on the Commission, and on respondents to complaints.

Unreasonably affect a person's privacy

For the reasons set out above, the Commission considers that the release of the documents requested unreasonably affects the personal privacy of MG, Mr Basikbasik and Mr Charlie.