

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

Program: Australian Human Rights Commission

Question No. AE17/011

Senator Macdonald asked the following question at the hearing on 28 February 2017:

CHAIR: Was this before or after you spoke about this particular incident very openly on the ABC's 7.30 on 7 November 2016?

Prof. Triggs: It was after, but I did not speak openly. I made it very plain before I went on that program that I would not discuss the QUT case. Then, live on air, of course it was the first question that was put to me. So I was in a very difficult position. My primary objective—and I stated it over and over again—was that I could not reveal details of that case; that I could speak only in the most general terms about how we handle our complaints processes.

CHAIR: But the record will show what was actually said on that report. Did you discuss the QUT incident specifically?

Prof. Triggs: I did not discuss any of these facts. I just said that basically the matter had substance and we could properly consider it under our act.

CHAIR: Does your media group have a transcript of that 7.30 report?

Prof. Triggs: I believe we could obtain one.

CHAIR: Would you mind, on notice, providing that to the committee?

Prof. Triggs: I would be very pleased to do that.

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

The transcript is available on the 7.30 report website at
<http://www.abc.net.au/7.30/content/2016/s4570705.htm>

And is reproduced below

Transcript

LEIGH SALES, PRESENTER: And joining me now is the Human Rights Commissioner, Gillian Triggs. Thank you very much for joining us.

GILLIAN TRIGGS, PRESIDENT, AUSTRALIAN HUMAN RIGHTS COMMISSION: It's a pleasure, Leigh.

LEIGH SALES: As Sabra Lane just reported, the Human Rights Commission has said that the bar for accepting complaints is too low but you have the power to throw out complaints that are trivial, vexatious and lacking in substance. Why didn't you do that sooner in the QUT case?

GILLIAN TRIGGS: Perhaps I can first explain that the commission is bound to accept any complaint that is in writing that alleges a breach of the discrimination law.

So the first obligation is to accept the complaint and then to investigate it and conciliate it.

On that particular matter and I have to remind you that this is still before the Federal Court against the university and one student and others but what we did was do what we normally do which is investigate the facts, get a sense of what each of the parties is saying and then attempt to conciliate the matter.

And in good faith we tried for 13 or 14 months. Normally we conciliate about 76 per cent of matters within three or four months. That's normal.

LEIGH SALES: And why did it take so long?

GILLIAN TRIGGS: Well, I think this one was difficult because the parties took different points of view. There were a number of students that had said different things and so the issues in relation to each of them was different.

There were complaints not only about the university but the university staff.

It was quite a long matter. Some students had gone away on holidays, were difficult to connect and so on. So that was why it took much longer than usual.

LEIGH SALES: But why early in the process did you not determine that it was vexatious and a waste of time as the court found?

GILLIAN TRIGGS: Well, the court found that there was no reasonable prospect of reaching the standard that the Federal Court has adopted over a number of years.

LEIGH SALES: So the Human Rights Commission must have been aware it wouldn't meet that standard?

GILLIAN TRIGGS: Well, we could have made that judgement about what a court might do but that misunderstands our role.

Our role is not a court. We are there to, in effect, stop matters going to the court.

We have about 20,000 complaints a year, or matters a year. And we try, our job is to investigate and conciliate them and that's why we come back to the threshold point.

It's a very low threshold.

LEIGH SALES: Sorry, if I can just pick you up because I want to follow that up. You say that your role is partly to stop matters from getting to the court. So therefore, if you get a case that you clearly think is not going to be successful in court, why would you bother conciliating, why wouldn't you immediately say this is vexatious or a waste of time, it's worth dismissing?

GILLIAN TRIGGS: Some cases are vexatious or frivolous or brought for political purposes or even for a joke by a journalist and those cases, about 35, 40 per cent of them, are dismissed at a very early stage.

But this one was one that had a level of substance. The complaints were ones that attracted a certain measure of concern about the nature of the comments that were made.

I won't repeat the language but it was worrying and troubling and it may very well ..

LEIGH SALES: But the court ...?

GILLIAN TRIGGS: Well, the court came to a different view and we respect the view of the court.

LEIGH SALES: But why wouldn't the Human Rights Commission come to the same view as the court when it's your job to try to prevent things from reaching the court? You must have been trying to second guess what the court is likely to think?

GILLIAN TRIGGS: No, that is exactly what we're not doing. We're not there to second guess what a court will do. We're there because we must under our statute consider the complaint. We investigate it and try to conciliate it.

Now in the course of the conciliation, we may well say to the parties, "Look, this is not looking like a substantial matter." And that will often encourage the parties to withdraw or to conciliate.

LEIGH SALES: And in this particular case, did you advise Cindy Prior, the complainant, that her case was unlikely to succeed?

GILLIAN TRIGGS: I don't know that one of the staff members that were handling the matter, specifically advised but really is not our role.

Our role is to try to bring the parties together and for 14 months or at least for 12 of those months we believed that in good faith we were going to get a conciliation.

LEIGH SALES: But if your role is to try to bring the parties together so it doesn't go to court, then surely your role must also be to advise people if this goes to court, it's not going to be successful so don't waste time taking it to court.

GILLIAN TRIGGS: Well, in many matters I'm sure we give that advice. We would say this is not likely to succeed if you were to go to court.

LEIGH SALES: But you're not able to say for sure if that happened in this case?

GILLIAN TRIGGS: Well, I think it was probable that in the course of, discussions took place over 14 months, Leigh. I can't possibly tell you exactly what was said all across the process.

But also, when you get parties that are determined to pursue the matter and others that want to negotiate in good faith, it can be very difficult to get to the point where finally as president, I have to say that this is not reconcilable and we must terminate.

And that's what happened here.

LEIGH SALES: Your process took 14 months. Overall, the students and the complainant, Cindy Prior, had about three years of stress and uncertainty from this.

Is it fair to say the Human Rights Commission failed in its duty to prevent there being a long, drawn out case that ultimately ended up in court?

GILLIAN TRIGGS: No, it's not fair at all. As I say, almost all the matters we conciliate successfully and we conciliate 76 per cent of the matters that we try to conciliate.

Most of these matters are resolved within four months.

This is a very unusual case and it really proved very difficult with the lawyers for various sides, very difficult over those months.

But during that time we, in good faith, believed that the parties would actually resolve the matter and that would mean it would not have to go to court.

That is a primary objective of ours to try to ensure that people have got their day before the commission. They can make their argument, they can conciliate if possible. If they can't they have the choice but if I can say, barely 1 or 2 per cent of people ever go to court.

LEIGH SALES: I don't mean to labour this point but I just want some clarity around it. If your job is to try to prevent things from ending up in court, then let me ask again, why is it not the responsibility of the Human Rights Commission to make an assessment that this is not going to be successful in court, so therefore why are we wasting time about whether people can agree or disagree or whatever?

GILLIAN TRIGGS: Because the primary function is to achieve a conciliation.

In other words, we have 20,000, 22,000 matters coming through every year. Of course we don't want them going to court mainly because most Australians can't afford to go near the Federal Court.

So we are trying to persuade them for one side to acknowledge that perhaps a statement was unacceptable, for another to perhaps apologise.

That's mainly how these matters are resolved. We thought that would be the case here.

LEIGH SALES: In the 18C complaint against cartoonist Bill Leak, given that he is afforded the protections of 18D, that allow for defences including fair comment and artistic statement, will the commission advise the complainants in that matter to drop the case because it's not going to be successful in court?

GILLIAN TRIGGS: Well, we wouldn't advise a party to drop the case and I can't, as you know, speak about the Leak case because it's currently before the commission, but we would certainly be advising the complainants that are now on foot that 18D protects the right of a cartoonist to put a position in good faith in the public interest, particularly artistic works, historically the Federal Court have said would not constitute a violation.

LEIGH SALES: But then why does he have to go through this process? Because, you know, as has been said before, the process is the punishment.

GILLIAN TRIGGS: Well, it isn't usually. There are some instances, I should say all our processes are confidential.

So there's no, this extraordinary publicity that's been given to these two matters is very rare, very rare indeed.

As I say, on average we have got about 22,000 matters a year. You would have heard of one or two of them across three or four years. It is very unusual.

If the parties choose to put this in the public arena, and normally they do not, then of course the anxiety and the concerns are exacerbated but there is no doubt at all that during this process between the two major parties or the parties that are making complaints, we will be saying to them, there is 18D and that protects the right of a journalist to put a position in good faith.

Now that fails sometimes and it failed in the Bolt case.

LEIGH SALES: What you're basically saying is that Bill Leak will win the case?

GILLIAN TRIGGS: I'm not saying that at all, I'm saying, and it's not our job to make that judgement.

To use your phrase, we're not there to second guess the court. We're there to try to persuade the parties to understand their respected positions.

The nature of this cartoon has raised complaints by the community and that comes across the threshold and we must try to conciliate it.

If we can't and we will talk about 18D and the right to freedom of speech but if the parties in the end say we can't reach agreement on this, very often one party or the other wants to go to court, eventually, despite efforts on our part, we have to terminate it and the conciliation is ended.

LEIGH SALES: We're out of time, unfortunately. Thank you for joining us.

GILLIAN TRIGGS: Thank you very much.