



NAILSS
Australia



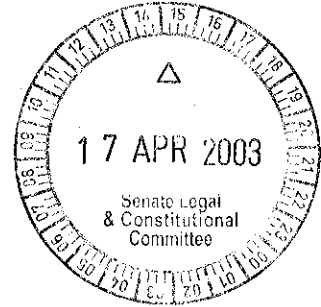
*National Aboriginal and Torres Strait Islanders Legal Services Secretariat
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Mr. Peter Hallahan
Secretary
Senate Legal and Constitutional Committee
Rom S1.61
Parliament House
CANBERRA ACT 2600



(Fax: 02 – 6277 5794)

Thursday, 10 April 2003

Dear Senators,

Reference: Inquiry into proposed amendments to the Human Rights and Equal Opportunities Commission Act (Cth)

Submission of the National Aboriginal and Torres Strait Islander Legal Services Secretariat Limited
NAILSS Australia

It has come to the attention of this National Secretariat for member Aboriginal and Torres Strait islander Legal Services (ATSILS) across Australia that the Senate is currently considering proposals by the Federal Government to alter the structure of the Human Rights and Equal Opportunities Commission (HREOC).

It is noted that HREOC purports to be evidence by the Australian Government of the implementation into Australian domestic laws and systems of various Human Rights instruments and agreements to which Australia as a nation is a signatory or which have been ratified by Australia.

The following concerns and issues are desired to be raised by the member ATSILS within NAILSS (pronounced 'nails') for the consideration of the Senate of the Commonwealth of Australia:

1. Reduction in complaints mechanism role of HREOC

The amendments passed since the accession to government of the John Howard coalition in 1996 have significantly reduced the level

of access for persons to any system of enforcement of Human Rights said to exist for them under the laws of Australia.

It is now the situation that respondents to a complaint lodged with the Human Rights and Equal Opportunities Commission have no incentive to participate in any conciliation process and can effectively force a complainant into a formal court process with the attendant risk of legal costs being awarded against a complainant through adoption of a course of conduct designed to bring about the issue of a President's certificate.

The current proposed amendments would seem to be designed to further strip away or divert the Federal Human Rights body (by whatever name it may be called) powers by changing the focus from both Human Rights education and enforcement to merely Human Rights education.

With respect, it is useless for any person to have many educational courses telling them what Human Rights they are supposed to enjoy or be entitled to within Australia if at the end of the day the same persons have no opportunity whatsoever of effectively having the rights they have been taught about enforced in an informal, prompt and no cost manner.

There is no incentive for corporations and employers and landlords to accept the obligations supposedly imposed upon them in regard to non-Discrimination if they are aware that there is no real or practical risk of any enforcement action being taken against them except at great risk to the person complaining of discrimination or any other breach of Human Rights.

Once again, Australia purports to have been part of a Coalition seeking to uphold the Human Rights of citizens of other nations around the world whilst seemingly moving quickly and quietly to undermine the rights of its own citizens and subjects to seek enforcement of Human Rights within Australia.

The implications as far as opportunities for negative comparisons to be made regarding Australia on the international stage must be of concern for all representatives of the peoples and States of Australia at the national level.

Recommendation

That the complaints resolution and rights enforcement responsibility of the HREOC (or any successor thereto) not be removed or reduced in any way as would result in citizens of Australia being educated extensively about Human Rights but being unable to effectively, simply and cheaply enforce or seek enforcement of such rights with

the assistance of the Government against well resourced or well connected respondents accused of violations of such rights.

2. International implications for changes to HREOC

At the very least, many NGO's will be compelled to report the proposals and negative developments in Australia to appropriate meetings and committees of the United Nations having responsibility for supervision of the implementation of the various treaties and instruments governing Human Rights.

This appears to highlight the reasons for the sudden concern since 1996 by the current "centre right wing liberal government" of Australia (a term used by a Japanese newspaper during the World Water Forum recently) for urgent "*reform*" of the United Nations system.

The term "*reform*" as used by Australia and the United States has been viewed by many involved in the protection and promotion of Human Rights as being a phrase designed to mask or hide the desire by the governments of both nations to reduce or restrict access to the United Nations away from non-Government Organisations (NGO's) and Individuals – the result being the inability of the United Nations to have knowledge of any developments in regard to Human Rights from year to year except as communicated in no doubt favourable terms by the relevant national government of the day and its paid officials.

In short, the United Nations and other international forums would have no entitlement to criticise any issue or problem in regard to Human Rights within any member State (nation) because such Member State would insist on the United Nations only relying on government statements and declarations.

The fact that Australia since 1996 and the United States have expended considerable taxpayer funding to denounce and oppose the proposed UN Draft Declaration on the Rights of Indigenous Peoples now means that such a declaration project will lapse at the expiration of the International decade of Indigenous Peoples in 2004 – a matter of international shame and disgrace for the people and Parliament of the nation of Australia.

Australia through AusAid has committed to the expenditure of considerable taxpayer dollars for Law and Justice reforms in Pacific Island nations like Fiji while steadfastly refusing to commit as a national government to any internal programme designed to bring about a national Bill of Rights or national Charter of Freedoms for the citizens of Australia.

There remains despite the will of the Australian people expressed during the reconciliation marches no formal national government commitment to a programme of development of recognition of the legal rights of Indigenous Australians – any suggestion that the Native Title Act 1993 provides rights to Indigenous Australians in respect of lands taken from them through colonisation must now be considered a farce since the Yorta Yorta decision in the High Court of Australia.

Discrimination and violation of Human Rights will not be tolerated by the national government of the Commonwealth of Australia only where such things occur outside of Australia – no such lack of tolerance seemingly will occur or exist within Australia once the proposed changes to the law sought by the Federal government pass the Parliament of the people of Australia.

Recommendation

That the structure and focus of the Human Rights Commission (or by whatever name such a Commission might be called in the future) must not be directly or indirectly inconsistent with or must not fall below the level of focus and standards established and spirit intended within the various international instruments and treaties setting out various Human Rights regardless of whether or not Australia as a nation is a party to or has yet formally adopted in any way any such instrument or treaty or recognition of any such Human Right.

3. Reduction of costs for taxpayer as excuse for changes

It is apparently to be asserted or has been asserted by the Federal government that reducing the number of Human Rights Commissioners by removal of the specialist positions and substitution of generalist Commissioners will somehow achieve savings for taxpayer funds.

It is submitted, with respect to the Parliament of Australia, that any such savings claimed to have been achieved or claimed to be capable of being achieved will be illusory.

The removal of specialist Commissionerships will mean that the reduced number of Commissioners will have to be trained in and capable of handling a substantially larger number of areas of concern and focus in regard to the various legislative Human Rights regimes within Australia.

A generalist Commissioner will need to be fully trained and focused upon the latest legal and international developments in areas as diverse as Sexual Discrimination, Disability Discrimination, Race Discrimination and potentially Age Discrimination amongst others.

The interpretation and application of various areas of the legislation and international rulings in regard to each particular discrimination and Human Rights area can change rapidly and often such changes can be extremely technical requiring a detailed understanding and depth of knowledge of the history and development to date of the particular Discrimination area.

It is simply imposing an intolerable burden in terms of capacity building, training and staff development costs to ensure that three Commissioners only will be capable of adequately servicing the needs and concerns of the entire population of Australia.

The increasing demands by the Federal government upon HREOC to assist the Federal government in its international Human Rights agenda overseas in nations such as Indonesia and China must have the corresponding outcome that matters requiring attention within Australia will lose priority and ultimately will not be capable of effective and timely resolution.

Recommendation

It is respectfully recommended that a separate Commission might be established to deal with matters of international Human Rights programmes or assistance in nations outside of Australia so as to leave the HREOC free to focus its limited resources and its limited staff (and possibly reduced staff after these proposals are passed) on the protection and advancement of Human Rights in Australia.

Taxpayers will find that the costs of litigation before a Federal Magistrate and attendant appeals through the Federal legal system will result in an unseen cost arising and that unseen cost to the public purse will be the additional funding and society cost blow outs resulting from police public order & anti-violence actions and accompanying criminal law or civil law court proceedings taking place where citizens have felt it necessary to protect themselves from discrimination rather than relying on the Federal government to provide such protection through educational courses but not with any enforcement systems.

An essential safety valve for Australian society will be removed if specialist Discrimination Commissioners are not available with the specialist knowledge and expertise required to bring about implementation and mediation in relation to issues of Human Rights and complaints relating to such issues.

4. Presidential allocation of specific responsibility for Racial Discrimination

It is understood by NAILSS and its member ATSILS across Australia that the proposed changes to the legislation will allow the President of the

Human Rights Commission (HREOC) to allocate (no doubt at the sole discretion of the President) any specific responsibility for specialist areas of Human Rights concern such as in the area of Racial Discrimination and Racial Vilification.

The general view of most ATSILS at present and those they serve is that Racial Vilification has been a toothless paper tiger given the complex drafting of the legislation where offensive and hurtful public statements and declarations by public figures attract no legal redress at all if evidence cannot be produced to demonstrate secondary action by others in reliance upon such public statements or declarations.

The recent United States Supreme Court decision in regard to Cross Burning is noted where legislation of a State outlawing such offensive and intimidatory actions was initially struck down against the wishes of the State concerned on the basis of a claim of free speech.

Fortunately, the US Supreme Court held (albeit on a majority verdict only) that *"even free speech has its limits"*.

Australians as yet have no clear expression in the Australian constitution at all that any right to Free Speech even exists under the laws of Australia and must be presently content to rely on the ebb and flow of judicial pronouncements of various Australian courts on whether such a right exists at all and to what extent as between States and Territories of Australia.

There is as yet under the Federal laws of Australia no legislative expression from the Parliament of Australia setting out any guarantees of the rights (if any) to be enjoyed by the States and Territories of Australia notwithstanding the provisions of section 109 of the Federal Constitution.

A President who is appointed at the whim and behest of any Government of the day in regard to the HREOC must be painfully cognisant of the pressures in practical terms upon that President in regard to not providing any obstacles against the wishes and policies of the Government of the day where such wishes or policies might otherwise offend or be likely to offend against any principles of Human Rights.

Recommendation

It is respectfully recommended that any proposal for a Commission President to make a decision to allocate any specific responsibility to a generalist Commissioner for an area of Discrimination or Human Rights must be impartial and must be preceded by a statutory consultation process with relevant stakeholders and organisations which may have an interest in the particular responsibility proposed to be allocated.

5. Proposal for Attorney General to vet HREOC interventions in legal proceedings.

It is understood that the changes proposed will include a requirement that HREOC must obtain the permission or Fiat of the Attorney General before the Commission can proceed to formally Intervene in any legal proceeding which may be considered to have matters or legal issues in dispute of test case level significance or of national or international significance in terms of the development of the law in regard to the existence and enforcement of Human Rights in Australia.

It is not entirely clear whether such limitation or obligation will apply to all legal proceedings including those in which HREOC or its successor may be involved as a direct party or only to those proceedings in which HREOC or its successor may have an option to become involved as a third party intervenor or whether there will be no vetting where the Attorney General is a direct party.

While there may be arguments regarding the cost to the taxpayer of such formal interventions available to the Government, there are also more significant concerns regarding the level of independence as well as the removal of the separation of powers in terms of the ability of the HREOC to independently and impartially assist any Court in terms of the development and clarification of the laws relating to Human Rights across Australia.

Great care must be taken not to allow the HREOC to simply become viewed by the Courts as merely another advocate or perhaps as a covert advocate for Federal government views and policies in regard to the law relating to Human Rights through the enactment of a provision which allows for pressure to be applied to the HREOC without accountability to the Parliament by the Attorney General in regard to decisions taken in instances where permission to intervene was denied or refused to HREOC or its successor to intervene.

Similarly, it is not impossible for a government of the day determined to have its way against the wishes of the public or against the demands for accountability by the Parliamentary representatives of the people to make procedures and processes for the obtaining of permission to intervene so complex or convoluted or so time consuming as to render any such process unworkable or impractical leaving the government free to act without risk of intervention from a seemingly independent observer or monitor for Human Rights in Australia.

Recommendation

That the provision proposed be amended to require that ***the Attorney General shall not refuse or deny permission or authority to the HREOC or its successor to intervene in any legal proceeding in any matter in which the Attorney General or the Commonwealth of***

Australia is also a party and in any other proceeding not unless the Attorney General shall have first provided to the Legal and Constitutional Committees of both Houses of the Australian Federal Parliament a written statement of reasons for any such refusal or for any decision to grant leave to intervene subject to any conditions (which conditions shall be explained as to their intent and purpose) whereupon either or both Committees of the Parliament or any similar committee may review any such decision of the Attorney General in not less than 14 days after the making of such decision and following such review either or both Committees may jointly or severally authorise the HREOC or its successor to intervene or may affirm the decision of the Attorney General provided that the authority of at least one such committee shall be sufficient to allow the HREOC or its successor to intervene in the relevant proceeding and the HREOC or its successor thereafter within a reasonable time after the conclusion of such proceeding report to the Attorney General and to each such Committee of Parliament on the outcome of such proceeding and the impact of intervention by HREOC or its successor on such proceeding (if any).

The preferred position of the members of NAILSS is generally that the Attorney General ought have no role whatsoever in regard to the intervention activities of HREOC but that the Attorney General is also free to intervene in the same proceedings if it felt that the legislation, policies or executive actions of the national government of the day are required to be clarified or protected in the course of any court proceeding.

CONCLUSIONS

- a. That the proposals ought be intensively scrutinised and carefully considered by the Senate of Australia (indeed by all representatives of the peoples of Australia) given the significant potential for such proposals to reduce or eliminate in practical terms the effectiveness of the current Human Rights Commission at a national level to monitor and criticise any actions and policies of the national government of the day;
- b. That the proposals for change must not be allowed to diminish the spirit and standards of Human Rights as envisaged in the international instruments, treaties and processes giving rise to such Rights;
- c. That the domestic laws of Australia must not be used as an excuse or shield by which the spirit or effectiveness or capacity to enforce Human Rights within Australia is prevented or delayed or diminished so as to benefit any government of Australia as against needs and concerns of its peoples;

- d. That changes to the laws of Australia must never be used as a means of diminishing the laws of Australia and/or the rights of the peoples of Australia;
- e. That the rights and freedoms of the peoples of Australia must be protected, promoted and advanced by all Parliaments of Australia in priority to any demands or policies or agendas of any government of Australia which has or may have the effect of reducing or undermining or eliminating the rights and freedoms of the peoples of Australia;
- f. That it is not and will never be in the national interest of Australia or of the peoples of Australia to diminish or reduce or undermine or render unworkable or render unenforceable any rights or freedoms of the peoples of Australia;
- g. That the peoples of Australia ought to the greatest extent possible within the resources of Australia enjoy the rights and freedoms of a democratic community of peoples inclusive of the right to adequately funded culturally appropriate legal representation as well as culturally appropriate low/no cost access to appropriate courts having jurisdiction to enforce the rights and freedoms of the peoples of Australia;
- h. That the right of all peoples of Australia to seek enforcement of laws outlawing or proscribing any and all forms of Discrimination (and in particular Racial Discrimination as well as any form of Racial Abuse or intimidation or victimisation or harassment or vilification) should be a right unable to be diminished or reduced or made unavailable by reason of complexity or cost as a consequence of any law or policy of any government within Australia at any level;
- i. That any right of free speech available within Australia carries with such right or its exercise the responsibility and obligation not to use or abuse such right as a means of inflicting or creating or inciting or causing or delivering or publishing in the view of any reasonable person any and all forms or instances of offence, hatred, abuse, intimidation, fear, intolerance, restriction of liberty, restriction of rights, restriction of belief, or xenophobia whether actual or perceived (whether or not popular or purportedly under official sanction of any government or agency or official) – i.e. Free speech has its limits;
- j. That promotion and protection of Human Rights and adequate funding on programmes for such purposes must be undertaken within Australia first before any such promotion or protection activities and public funding thereof is permitted to occur outside of Australia;

- k. That the domestic law of Australia must be declared to expressly incorporate and adopt any and all Human Rights and democratic freedoms expressed at international law and through the United Nations to exist and no law of Australia at any level should be interpreted in any way as excluding or diminishing or as not incorporating any and all such Human Rights and freedoms;
- l. That any and all Federal governments of the day regardless of political persuasion must remain fully and legally and adequately accountable to all the peoples of Australia and to the representatives of the peoples of Australia and to the representatives of the federated States of Australia for any and all policies and agendas and decisions which have the effect or will have the effect of reducing or removing or preventing the effective enjoyment of the Human Rights and democratic freedoms of the peoples of Australia;
- m. That proposals for practical reconciliation with the Indigenous peoples of Australia must never be used or asserted by any government as a trade off or as an alternative to the exclusion of the legal recognition of the rights and entitlements of the Indigenous peoples of Australia and their communities and their organisations inclusive of the right without limitation to be treated and recognised as the legal first peoples and owners of the land now called Australia and its resources;
- n. That the Indigenous Peoples of Australia and their organisations and their communities must at all times be entitled under the laws of Australia to be consulted adequately and fully and well in advance of any government programmes and activities and decisions affecting the legal, social, political, and economic situation of any of the Indigenous Peoples and their communities and their organisations jointly and severally without fear, favour or negative discrimination;
- o. That Human Rights should never be treated by any Federal government of the day as a negative concept or as rights not appropriate to the peoples of Australia or as rights to be opposed or rejected by the government or by any agency or official of the government for any reason whether or not such Human Rights may pose a problem or obstacle for the introduction or implementation of any government legislative, political or economic policy or programme at any time;
- p. The diplomatic corps and international representatives of Australia must at all times not be instructed by any Government of Australia to oppose or delay or diminish or obstruct directly or indirectly any measure or proposal for the development or creation of any Human Right for any person, group, minority, Indigenous people, or section of society wherever such a person, group, people or sector of

society indicate their desire for such development or creation to proceed or be completed at an international level (provided only that such measure or proposal for Human Right does not expressly authorise the use of any violence or use of weapons of mass destruction within or against any member State of the United Nations or any nation within the International community as a means of enforcing such Human Right);

- q. That the integrity and independence of any and all Human Rights bodies, committees, monitoring bodies, Commissions, officials, staff, and resources at all times be adequate and sufficient for the purpose and must never be subject to the will or instruction of any political party, government, government official or structure to any extent that such integrity and independence and resourcing will be diminished or undermined or removed for any reason whatsoever;
- r. That the appointment of Human Rights officials and Commissioners and staff within Australia should be the product of prior (well before time) and adequate consultations with all relevant stakeholders and organisations and persons within Australia having an interest in the positive promotion and protection and advancement of Human Rights for all sectors of Australian society especially in regard to sectors of society affected or likely to be affected by Racial Discrimination, Disability Discrimination, Sex Discrimination, Indigenous discrimination, discrimination on the basis of the assertion of any Human Right or democratic freedom, Age discrimination, Poverty Discrimination or discrimination on the basis of any form of harassment or intimidation or abuse based on any of the above forms of discrimination in any way);
- s. That any national government of the day must never use any statutory power of control or authority or funding over any Human Rights body (whether government or non-government) to bring about or induce any reduction in the capacity of any person or group or community or peoples in Australia to enjoy, have access to or enforce any Human Right or democratic freedom inclusive of and without limitation to any right or entitlement to peacefully criticise or complain or challenge decisions or activities of any Australian government, any representative of any Australian government or any government official or agency;
- t. That the Parliament of Australia always has and has had or ought to have the lawful right to review of its own motion and to reverse or amend without consultation with any national government of the day any and all such laws or regulations or government decisions or government activities which may be held by the Parliament of Australia to violate or diminish (whether intentionally or unintentionally) any and all Human Rights or democratic freedoms or both which the peoples of Australia are entitled or ought to be entitled to peacefully enjoy, have access to or enforce with

adequate funding and assistance where required without fear of reprisal from any government or government official or government agency;

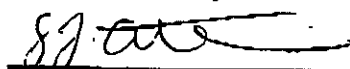
We thank the Senate of the Parliament of Australia and the members of the Legal and Constitutional Committee for the opportunity to provide a submission at a national level on behalf of member ATSILS and on behalf of the Indigenous peoples and communities of Australia in regard to the matter of the proposed changes to the structure and systems of HREOC as it is currently known.

It should be noted at all times that member ATSILS are autonomous community based public / community sector non-profit non-government organisations to which NAILSS is answerable and as such all ATSILS are free at all times to provide their own direct submissions to the Parliaments of Australia on any and all issues or matters of direct regional or local concern to such ATSILS.

Please do not hesitate at all to contact the writer or the National Coordinator & CEO, Mr. John Leslie, at any time for any further discussions, information or to arrange for any representative of NAILSS to attend before or meet with the Senate Legal and Constitutional Committee (or any delegates thereof) at any time in regard to any of the above.

We sincerely trust that the above will be of assistance to the Senate and the Parliament as a whole as the representative of the Peoples of Australia (regardless of race or distinction) in the consideration of the proposals now under examination.

Yours Faithfully,



Geoffrey Atkinson LLB, JP
National Solicitor / National Lawyer
Office of the National Solicitor, NAILSS Australia

National Secretariat for member Aboriginal and Torres Strait Islander Legal Services across Australia

A Consultative Status NGO of the UNITED NATIONS
(under Article 71 of the Charter of the United Nations 1945)

- Accredited to the Economic and Social Council of the United Nations (EcoSoc, New York)
- Accredited to the Commission on Human Rights (UN CHR, Geneva)
- Accredited to the Commission on Crime Prevention and Criminal Justice (UN CPCJ, Vienna)
- Accredited to the Subcommission on Prevention of Discrimination and Protection of Human Rights (Geneva)
- Accredited to the Working Group on Indigenous Populations (UN WGIP, Geneva)
- Accredited to the UN Permanent Forum on Indigenous Issues (UN PFII, New York)
- Accredited to the UN World Criminal Justice Information Network (UN WCJIN, Washington DC)

- Accredited to the CHR Working Group on a Draft Declaration on the Rights of Indigenous Peoples (UNCHR WGDDRIP, Geneva)
- Accredited to the World Conference on Racism, Racial Discrimination, Xenophobia and related Intolerance (Durban, South Africa)
- Accredited to the UN Convention on Biological Diversity (UN BIODIV, Montreal)
- Accredited to the UN Working Group on Indigenous Intellectual Property and Traditional Knowledge & Article 8(j) of BIODIV (Madrid)
- Accredited to the World Intellectual Property Organisation (UN WIPO, Geneva)
- Accredited to the Australian Attorney General's NGO Forum on Domestic Human Rights (Canberra)
- Accredited to the Australian Department of Foreign Affairs and Trade Human Rights Forum (DFAT HR Branch, Canberra)
- Accredited to the Commonwealth Association of Indigenous Peoples (CAIP, London)
- Accredited to the Pan Pacific Legal Aid Conference (Japan Legal Aid Association - JLAA, Tokyo)

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