



Aboriginal Legal Rights Movement Inc.

ABN 32 942 723 464

ADELAIDE
321-325 King William Street
Adelaide SA 5000
DX 239
Ph (08) 8211 8824
Fax (08) 8211 7618

NATIVE TITLE UNIT
Level 4
345 King William Street
Adelaide SA 5000
DX 239
Ph (08) 8212 1244
Fax (08) 8211 7424

CEDUNA
cnr East Tce & Merghiny St
PO Box 419
Ceduna SA 5690
DX 51904
Ph (08) 8625 2432
(08) 8625 2200
Fax (08) 8625 3093

MURRAY BRIDGE
3-5 Bridge Street
PO Box 763
Murray Bridge SA 5253
DX 51215
Ph (08) 8532 4788
Fax (08) 8531 1015

PORT AUGUSTA
12 Church Street
PO Box 1771
Port Augusta SA 5700
DX 51023
Ph (08) 8642 4366
Fax (08) 8642 4650

PORT LINCOLN
30 Ravendale Road
PO Box 800
Port Lincoln SA 5606
Ph (08) 8683 4160
Fax (08) 8683 4160

Reply To: Adelaide

Your Reference:

Our Reference:

23rd April 2003



Louise Gell
Acting Secretary
Senate Legal and Constitutional Committee
Room S 161
Parliament House
Canberra ACT 2600

Dear Louise,

Re: Submission on the *Australian Human Rights Commission Legislation Bill 2003*.

The Aboriginal Legal Rights Movement (ALRM) is the peak legal aid body for Aboriginal and Torres Strait Islander peoples in South Australia and makes the following submission to your committee.

We are making this submission on behalf of our clients – the Aboriginal and Torres Strait Islander peoples of South Australia, on the impact the proposed *Australian Human Rights Commission Legislation Bill 2000* would have on the advocacy and representation of the rights of our clients.

The *Australian Human Rights Commission Legislation Bill* proposals to restructure the current Human Rights and Equal Opportunity Commission would be of considerable detriment to our clients.

We preface our submission with an expressed concern for the short time frame that has been made available to present submissions to the committee. We also comment on the lack of opportunity available to us to provide further oral evidence before a public hearing of your committee.

1. Aboriginal and Torres Strait Islander Social Justice Commissioner

The role and functions of the Aboriginal & Torres Strait Islander Social Justice Commissioner were created in 1992 for the purpose of ensuring, in accordance with the recommendations taken from the Royal Commission into Aboriginal Deaths in Custody and HREOC's National Enquiry into Racist Violence, that there would continue to be ongoing monitoring of the human rights of Aboriginal and Torres Strait Islander peoples of Australia.

The *Australian Human Rights Commission Legislation Bill* proposes to repeal the position of Aboriginal and Torres Strait Islander Social Justice Commissioner, and to instead offer Aboriginal and Torres Strait Islander peoples access to a new generalist human rights structure. This proposal would no longer provide a specialist

Commissioner but instead access to 3 general Commissioners and the President of the Commission. Under this proposal we would no longer have the opportunity to access the special services that have been provided since the creation of this position in 1992.

This aspect of the proposed changes would be of considerable detriment to our clients. The human rights issues, which arise for Aboriginal and Torres Strait Islander peoples, are of a special nature and they require a specialist response.

The creation of the position of Aboriginal and Torres Strait Islander Social Justice Commissioner has provided our organisations with the opportunity to bring a number of complaints before the Commission. Since the 1st July 1999 ALRM have acted in 70 discrimination matters, of which a large number of those matter have been pursued through the Commonwealth legislation.

The Royal Commission into Aboriginal Deaths in Custody (RCIADC) found there was disproportionate representation of Aboriginal and Torres Strait Islander peoples before the criminal justice system, along with other serious breaches and denials of human rights. As a step forward the RCIADC made recommendations for the establishment of the position of Aboriginal and Torres Strait Islander Social Justice Commissioner. It is a position that is supported by our organisation, for both its retention and expansion. This would be a step towards ensuring the enhancement and improvement and overall effectiveness of the processing of the complaints made by Aboriginal and Torres Strait Islander peoples.

2. Inadequate resourcing of HREOC

The suggestion made by the Commonwealth Attorney-General that there would be no additional resources made available to the Commission is of serious concern to our organisations and clients. The failure of government to ensure adequate funding of the Commission would be of detriment to our clients and the protection of their human rights.

The profile of Aboriginal and Torres Strait Islander peoples within the criminal justice system, and also within all other social and economic indicators, illustrates that their position remains mostly unchanged. In the '2001 Social Justice Report', of the Aboriginal and Torres Strait Islander Social Justice Commissioner, in his introduction at p 1 it states;

Overall, however the Report evidences that the past year has been another difficult one for Indigenous people in this country. In trying to provide a snapshot of the status of Indigenous policy making and achievements by governments over the past year, it is difficult to see any consistent forward trend. There have been marginal improvements in some statistical indicators, but deterioration in others. The policy approaches of governments are ultimately full of inconsistencies, ad hoc developments, and commitments that not only remain unmet but which are not adequately supported by institutional developments.

3. The ATSIJ Commissioner's vital role as reporter and monitor

It is in the best interests of our clients that the position of Aboriginal and Torres Strait Islander Social Justice Commissioner be maintained. This is particularly important in light of the recommendations made by the Royal Commission into Aboriginal Deaths in Custody, and also the recommendations made in the HREOC 1997 *"Bringing Them Home Report"*.

Confirmation for the need to retain this position and its significant role in monitoring the human rights of our clients is particularly clear when we review the contemporary situation, which remains in many Aboriginal communities today unchanged.

The current position of Aboriginal and Torres Strait Islander peoples should be of serious concern to government and this requires the continued monitoring through, the provision of the annual Social Justice Report which is prepared by the specialist Aboriginal and Torres Strait Islander Social Justice Commissioner.

The Aboriginal & Torres Strait Islander Social Justice Commissioner's Annual Report, since its first publication, has provided a vital and unique source of information to all governments and NGO's. ALRM has used this information extensively in bringing greater awareness of the position of Aboriginal and Torres Strait Islander peoples before the courts and their administration.

One of the recommendations to come out of the RCIADC was the need to continue monitoring human rights and trends of political, economic and social marginalisation within the Aboriginal Torres Strait Islander peoples, we consider the annual report provides a good basis for that monitoring process, and is currently the only independent monitoring now occurring in Australia.

4. Need for specialist ATSIJ Commissioner

The *Australian Human Rights Commission Legislation Bill 2003*, does not require the appointed Human Rights Commissioners to have any particular expertise, experience or knowledge of Aboriginal and Torres Strait Islander peoples. ALRM submit this lack of expertise would be detrimental to the special needs of Aboriginal and Torres Strait Islander communities across Australia.

The proposal for the position of the Aboriginal & Torres Islander Social Justice Commissioner to be replaced by a generalist position poses serious concerns for our organisation, as this proposal would ensure that there would no longer exist an expert or professional focus on the issues of Indigenous peoples' human rights.

The special needs of Aboriginal and Torres Strait Islander peoples, who are a minority group within Australian society, representing less than 2% of the Australian population, require a specialist Aboriginal & Torres Islander

Social Justice Commissioner to ensure the continuous monitoring of that marginal position.

ALRM views the current structure of specialist office holders within the Commission as best serving the interests of our clients. If the *Australian Human Rights Commission Legislation Bill 2003*, was passed into law and a generalist Commission were established, our clients would be left with the question: who would best deal with their issues? Would they be characterised as matters of racial discrimination and or as questions of Indigenous human rights? How would we resolve these questions in a way that was culturally appropriate to the needs and requirements of the ATSI communities?

The requirement of Aboriginal Social Justice Commissioner under the current section 46B of HREOC Act states:

“a person is not qualified to be appointed unless the Governor General is satisfied that the person has significant experience in the community life of Aboriginal persons or Torres Strait Islanders”.

ALRM strongly supports the view that this above criteria should be retained and satisfied in the appointment of any future Aboriginal & Torres Strait Islander Social Justice Commissioner.

5. Aboriginal & Torres Strait Islander Social Justice Commissioner – reporting pursuant to s 79 Native Title Act 1993.

The Aboriginal & Torres Strait Islander Social Justice Commissioner has responsibility conferred under Section 79 of the *Native Title Act 1993*, to prepare and submit to the Commonwealth Minister an Annual Report on the operation of the *Native Title Act* and on its effect in the exercise and enjoyment of human rights of Aboriginal people & Torres Strait Islanders.

This function of the Commissioner requires a highly specialised area of expertise. The current developments in Native Title law are illustrated in the 2002 High Court *Yorta Yorta* and the Federal Court decision before Justice O’Loughlin in the *De Rose Hill* matter. These decisions indicate a further narrowing of the law in its recognition of the native title rights of Aboriginal and Torres Strait Islander peoples. This is a particularly important time in the development of native title law and it requires, as stated above, a particularly specialised area of expertise to keep abreast of current developments in native title law.

6. HREOC capacity to intervene in court proceedings

On behalf of our clients, ALRM is concerned with the proposal in the *Australian Human Rights Commission Legislation Bill 2003* to prevent HREOC from intervening in court proceedings without the authority of the Commonwealth Attorney-General. This proposal would impact upon the current structure in the following ways:

- It would restrict the independence of HREOC in the exercise of its discretion to intervene for the purpose of representing the interests of Aboriginal and Torres Strait Islander peoples.

- In matters where state or federal governments are a party to the proceedings, there is a need for the Commission to have the discretion to intervene, as it did in the matter of *Kartinyeri*, without the prior approval or otherwise of the Attorney-General.
- Any lack of independence of the Commission, compromises its capacity and as a result it would fail to address the special needs of Indigenous peoples.
- The formulation of the Attorney General's opinion, as to whether proceedings may affect to a significant extent the human rights of or involve significant issues of discrimination against persons who are not parties, brings with it a highly subjective level of enquiry. We have no indication as to how the Attorney-General would come to a determination as to balancing the human rights interests of both parties and those who are not parties to any proceedings. This is particularly of concern in matters where the Commonwealth is a party to the proceedings.
- The proposal that the Attorney-General's determination must have regard to the public interest is of concern to ALRM. Our clients comprise the most marginalised minority group in the Australian community. It is understood that public interest will be given consideration, however the concerns of minority groups, such as our clients, are sometimes in conflict with the considered 'greater' public interest. The suggestion that interventions should be in accord with the interests of the Australian community as a whole, promotes the idea of an Australian community that comprises one homogenous nation group, with interests and needs that are all the same. This is an idea that in practise would exclude the interests of our clients.
- The Attorney-General has a broad discretion to consider a number of matters before making a determination as to whether or not to allow the Commission to continue in any intervention in any court proceedings..
- It is of concern that the Bill does not recognise the authority of the court to determine if it should grant leave to the Commission to approach the court directly.
- This limit raises questions of conflict of interest particularly in matters where the Commonwealth is a party. This occurred in the matter of *Kartinyeri v Commonwealth*. Under this Bill the Commission would not be able to intervene on important issues of race discrimination.
- The idea of 'special measures' is central to the Commonwealth *Race Discrimination Act of 1975*. Special measures is a concept in international law and was developed to provide minimum human

rights standards for the protection and promotion of groups disadvantaged by the impact of racism.

ALRM consider the proposal that interventions can only proceed where the best interests of the whole community are considered, could undermine the meaning and intent behind the Commonwealth *Race Discrimination Act 1975* and its recognition of special measures.

7. Independence of HREOC

ALRM submits that the requirement to obtain approval from Attorney-General for the purpose of making an intervention is likely to result in serious limitations being imposed on the independence of any future human rights body. The very nature of independence of human rights bodies requires independence from government, particularly for the purpose of monitoring the role and performance of government in the area of human rights law.

ALRM support the argument and submissions made by HREOC that is, the Commission is likely to be denied the opportunity to argue human rights issues before the courts in cases where the Commonwealth takes a different view to the Commission of Australia's human rights commitments.

It is fundamental to the protection of human rights that any body established to monitor developments in this area must retain and maintain its independence from both Federal and State government institutions. In 1993 the UN General Assembly reaffirmed the importance of developing, in accordance with National legislation, effective national institutions for the promotion and protection of human rights and of ensuring their pluralism and independence."(UN Resolution A/RES/48/134 of 20 December 1993)

8. HREOC versus Australian Human Rights Commission

The proposal for a change of name, gives the Commission a specific Australian context. The concept of human rights is derived from international law.

The proposed name change should not be used to narrow our understandings of international law standards, to being as simply applied within Australia.

On behalf of our clients, our organisation is concerned at the possibility of any narrowing of international human rights laws. For example the High Court decision in *Mabo No 2* considered the relevance of international law in support of its rejection of the racist doctrine of terra nullius. To ignore international human rights standards would be a sad return to the pre-*Mabo No 2* days of terra nullius.

9. Education and community awareness

The proposal in this Bill to promote education and awareness within the community, and the logo, 'human rights is everyone's responsibility' is supported by our organisation as being of considerable importance.

However, the office of Aboriginal & Torres Islander Social Justice Commissioner has done an excellent job serving this goal, through promoting a greater level of understanding of the position of Aboriginal and Torres Strait Islander peoples. To repeal the position of Aboriginal & Torres Islander Social Justice Commissioner would render the above logo, 'human rights is everyone's responsibility', to rhetoric and tokenism with respect to its application to the practice of recognising, protecting, and advocating the human rights of Aboriginal & Torres Islander peoples.

10 Complaints procedures.

While this Bill considers retaining the Commission's powers to investigate and conciliate complaints, ALRM is concerned that there will be no specific focus given to the special interests and human rights concerns of Aboriginal & Torres Strait Islander peoples.

The recommendation for the appointment of legally qualified persons to manage complaints made to the Commission is welcomed and supported, however, as stated above, this proposal will only be of benefit to our clients if it is managed by an expert position, an Aboriginal & Torres Islander Social Justice Commissioner, as we have demonstrated above.

The homogenous approach of this Bill has failed to embrace the issues of difference that Aboriginal and Torres Strait Islander peoples raise.

11. Community Relations Council

The recommendation to repeal the Community Relations Council as recognised under the *Race Discrimination Act 1975* is not supported by the ALRM.

The Council has not been established and as a result its potential has not been realised. It is a body that could be used by the ATSI people and for that reason should not at this stage be repealed without further debate in the community.

It is our submission that there be no repeal of the Community Relations Council and that the government consider constituting a properly resourced Council to put into effect the necessary work in improving community relations on issues of race.

Similarly the recommendation to repeal advisory committees is not supported by our organisation. ALRM are able to identify a number of areas where advisory committees would benefit our client's interests. For example on issues of continuing high levels of incarceration within the criminal justice system, the failure of native title law to address land dispossession, poverty and social and cultural disenfranchisement, family violence strategies, economic development, and cultural heritage protection.

We have yet to realise the potential of the Community Relations Council as recognised under Part IV of the *Racial Discrimination Act* and any suggestion to repeal or abolish the possibility of establishing such a Council should not be supported. We support the submissions that have been presented in the past by HREOC that is particularly in light of the current national sensitivities of issues relating to race. A body such as the Community Relations Council could provide considerable support to the reconciliation process and other issues of concern in our community.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Neil Gillespie', with a long, sweeping horizontal stroke extending to the right.

Neil Gillespie
Chief Executive Officer
Aboriginal Legal Rights Movement