Senate Legal and Constitutional Legislation Committee

Inquiry into the provisions of the Australian Human Rights Commission Legislation Bill 2003

Submission by Hal Wootten AC QC.

Introduction

I write to voice particular objection to the provisions of the Bill that would abolish the office of Aboriginal Social Justice Commissioner, and would introduce a requirement that the permission of the Attorney-General be obtained before the Human Rights Commission intervenes in court proceedings.

I write in a personal capacity, and I do not currently hold any office or representative role. I do however have a perspective based on various roles I have played in the past. Among other things I was founding President of the first Aboriginal Legal Service in 1970, founding Dean of the University of NSW Law School from 1969-1973, where I proposed the first program for special admission of Aboriginals to an Australian university, a justice of the Supreme Court of NSW from 1973-1983, a Royal Commissioner into Aboriginal Deaths in Custody from 1988-1990, a rapporteur on several occasions for the Minister for Aboriginal Affairs under the *Aboriginal and Torres Strait Islander Heritage Act 1984*, and a Deputy President of the National Native Title Tribunal from 1994-1997. In 1990 I was made a Companion of the Order of Australia for services to human rights, conservation, legal education and the law.

The office of Aboriginal Social Justice Commissioner

As the Minister for Aboriginal Affairs, Mr Tickner, explained to the House of Representatives on 12 November 1992, '[t]he establishment of an Aboriginal and Torres Strait Islander Social Justice Commissioner is a direct result of the first recommendation of the final report of the Royal Commission into Aboriginal Deaths in Custody'.

It had taken an extraordinary episode of Indigenous anguish to engage the attention of governments to the point where a Royal Commission was appointed. In just 6 weeks between 24 June 1987 and 6 August 1987 there were five Aboriginal deaths in custody, all by hanging, and four in police cells. This followed 11 deaths earlier in the year, five by hanging. In the end the Commission found about 100 deaths within terms of reference that went back to 1 January 1980. It also found that the biggest explanatory factor in what looked like a disproportionate number of Aboriginal deaths was not the rate at which Aboriginal prisoners died when in custody, but the extraordinary rate at which they were held in custody. The Commissioners were all of the view that this situation was in some degree due to discriminatory operation of the criminal law and police and judicial practices, but that by far the biggest factor was the depressed and disadvantaged position of Aboriginals in the Australian community.

Although Commissioner Johnston, who wrote the National Report of the Royal Commission, made numerous recommendations to improve the working of the criminal justice system and the care of prisoners, about half of his 339 recommendations were directed to other issues of a general social, political and/or economic nature. He was very conscious of the high expectations that the Commission had raised amongst Aboriginals, and very concerned that his recommendations should not meet the fate of those of many other Royal Commissions and be quietly shelved and forgotten. His first recommendation called on the Commonwealth Government and State and Territory Governments, in consultation with ATSIC, to agree on a process which ensured that the adoption or otherwise of recommendations and the implementation of adopted recommendations would be reported upon on a regular basis with respect to progress on a Commonwealth, State and Territory basis. It was to this recommendation that Mr Tickner referred.

Most of the recommendations required not one-off responses from Governments, but ongoing responses. The Preface to the National Report, signed by all Commissioners, looked forward to a time when 'there may be an end to the situation where so man\y Aboriginal people live and die in custody'. That time, as I will show later, has not been reached. But in any event the creation of the office of Aboriginal Social Justice Commissioner was not specifically linked by Parliament to the monitoring of Commission recommendations, but was deliberately given a much broader focus.

In the second reading speech presented to the House of Representatives on 3 November 1992 by the Attorney-General, Mr Duffy, and to the Senate on 4 November 1992 by Senator McMullan, the then Government said:

> The response of all Governments to the recommendations of the Royal Commission has been very positive. But there continues to exist a need for us as a nation to regularly focus on the extent to which Aboriginal and Torres Strait Islander people are able to exercise the basic human rights that the rest of the nation take for granted. The creation of this office and the production of a yearly report will provide this focus. I hope that all Governments will actively co-operate in the work of the Commissioner to allow for that office to be part of the ongoing push to improve the everyday lives of the first Australians.

The establishment of the office had the unreserved support of all parties, as expressed in the Senate on the 8 December 1992 by Senator Hill, Leader of the Opposition in the Senate, and Senator Spindler for the Australian Democrats.

Parliament could, had it thought it appropriate, and as the present Bill proposes, have simply given express responsibilities to focus on the human rights of Indigenous people to the Commission exercising its other functions, but as the second reading speech made clear the creation of the special office, as well as the production of a yearly report, were seen as appropriate to provide the necessary focus.

In view of the current proposal to remove the specific focus by a specialist Commissioner on Indigenous issues, it is worth noting that both representatives of minority parties shared the Government's view that such a focus was the essence of the proposal. Senator Hill expressed the hope that 'the Commissioner will be able to

better serve the interests of that particular community' and Senator Spindler welcomed and applauded the initiative 'to make sure that we, as a community, ensure that the human rights of Aboriginals and Torres Strait Islanders are protected and their position in the Australian community is progressively improved'.

The present Bill is, to use the Attorney-General's term, a legislative 'refocus' of the Commission's functions. A notable element of the refocus is the removal of a specialist Commissioner focussing on Indigenous affairs. Whereas under the present Act 'a person is not qualified to be appointed unless the Governor-General is satisfied that the person has significant experience in community life of Aboriginal persons or Torres Strait Islanders', under the proposed amendment there is only the general requirement that before the Governor-General makes an appointment the Minister must be satisfied that the President, the other Human Rights Commissioners and the person, as a group, have expertise in the variety of matters likely to come before the Commission.

Is the need for such a specialised office any less today than in 1992? For anyone who has taken the slightest interest even in the bare statistics of the Aboriginal situation, the question scarcely needs to be asked. I will give only a few of the answers that might be given.

Figures first published in the *Social Justice Report* 2002 show that at 30 June 2002 the imprisonment rate per 100,000 was 3,421 for Indigenous men, compared with a figure for all men of 276.4. (Note that as the figure of 276.4 is for **all** men; the figure for non-Indigenous men would be much lower.) For Indigenous women it was 275.6 compared with 18.2 for all women. An Indigenous man is 15.2 times more likely to be in prison than a non-Indigenous man, and an Indigenous woman 19.6 times more likely than a non-Indigenous woman. An Indigenous woman is in fact considerably more likely to be in gaol than a non-Indigenous man.

On another front, a recent article in the Australian Medical Journal records that current infant mortality rate for the Aboriginal and Torres Strait Islander population is almost three times that of the general Australian population, twice that of the Maori, and 50% higher than the mortality rate of US Indigenous infants. Death rates overall for Indigenous people in Australia are still three times as high as for the rest of the population: diabetes death rates are eight times as high, respiratory deaths four times as high and circulatory conditions almost three times as high - unacceptable statistics for treatable and preventable conditions.

The point is, of course, not that the existence of an Aboriginal Social Justice Commissioner is a solution to such problems (it plainly has not been), but that the present is no time to be abolishing the only independent, specialised and informed source dedicated to keeping the issues before Government and the public, and pressing for appropriate attention. Public challenge and confrontation, whether from United Nations or local human rights sources, is never attractive to Government, and may sometimes seem unfair, but is the only way of ensuring continuing attention. Many of the problems affecting the Aboriginal community are proving very difficult to resolve, and the last thing Australia should be doing is sweeping them under carpet, which can all too easily happen as non-specialists are distracted by more general and more easily solved problems.

The reason for the change given in the second reading speech gives every reason to fear that this would be a likely, even desired outcome:

> A new executive structure for the commission, with a strengthened `collegiate' approach, will assist the commission in reaching the broad spectrum of Australians. The bill provides for three human rights commissioners to replace the existing portfolio specific commissioners. The human rights commissioners and the president will have a common responsibility to protect and promote human rights for all Australians.

The use of phrases such as 'the broad spectrum of Australians' and 'human rights for all Australians', used in contrast to the human rights of the Indigenous minority, are highly suggestive of the One Nation Party discourse, and have become code for dismissing special attention to the rights of Indigenous Australians as 'sectional', divisive', and an affront to 'equal rights for all'. Formulae that present themselves as inclusionary of wider interests are in actual operation exclusionary of minorities who have special needs.

I have confined my remarks to issues of principle, because that is the only basis on which the Second Reading speech seeks to justify the proposed changes. I would only add that the calibre and conduct of the two Aboriginal men who have held the office of Social Justice Commissioner, Professor Mick Dodson and Dr Bill Jonas, have enhanced the reputation of Australia at home and overseas. In addition to the work they have done, thy have been invaluable as role models for young Aboriginals. Abolition of the office could only have a retrograde effect on the process of reconciliation.

The Commission's right to intervene

I find it strange that a Commonwealth Attorney-General should seek to justify the requirement that his permission be obtained before intervention in a court proceeding on the ground that this will, to quote his Second Reading speech, 'ensure that court submissions accord with the interests of the community as a whole'. I do so for two reasons. First, in democratic countries it is well understood that there are often differing views about what is in 'the interests of the community as a whole'. Only in totalitarian states is it assumed that there is only one view of the public interest and that that view is to be determined by a public functionary and other views silenced. The fact that the Attorney-General should assume that he is uniquely qualified to determine this issue, and entitled to override a contrary view formed by an independent and well-qualified Human Rights Commission, is strong evidence of the need to retain the provision.

Second, I am also surprised that a Commonwealth Attorney-General should take the view that it is wrong for the Human Rights Commission to defend the human rights of an individual or group if they collide with the interests of the community as a whole. The whole point of human rights is that they assert the need to assert and protect some individual or minority interests against the indifference, ignorance or tyranny of majorities who think that the interests of the community as a whole should prevail over anything.

Surely the primary purpose of a Human Rights Commission is not the mere dissemination of information about human rights, but the provision of machinery through which those rights may be asserted, against the Government or even Parliament if necessary, by an independent Commission with adequate resources to defend them. It is a cruel and empty gesture to educate people about human rights while empowering a political officer of the government to prevent their assertion by the relevant independent expert body.

This is particularly apposite in the case of Indigenous people who, partly as a result of the denial of their human rights in the past, often lack the skills and resources to protect them now against a majority community that is still capable of acting without sensitivity or respect for their interests. In matters arising under the *Native Title Act* 1993 there is currently funding available through Native Title Representative Bodies for the assertion of Aboriginal interests, but in other spheres there is often no assistance available to support the assertion and defence of Indigenous interests. Aboriginal Legal Services exist but are neither funded nor permitted to play the role that it is now open to the Human Rights Commission to undertake in proceedings in which Indigenous human rights may be at issue. What is at stake is not the right to get a matter decided in a particular way, but the mere right to present a point of view to an appropriate court when Indigenous human rights are at issue.

Even if the Attorney-General were obliged to consider all relevant matters, his conflict of interest would place him in a hopelessly compromised position, most obviously where the Commission wished to challenge Commonwealth legislation or Government actions. But that question does not even arise. The new Section 11(5) specifically provides that the Attorney General, in deciding whether the Commission may intervene, **need not** have regard (amongst other things) to whether the proceedings may affect to a significant extent the human rights of, or involve significant issues of discrimination against, persons who are not parties to them; whether the proceedings have significant implications for the administration of the Act, or the *Racial Discrimination Act 1975*; or whether there are special circumstances such that it would be in the public interest for the Commission to intervene. The purpose is obviously to deny the possibility of judicial review of the Attorney-General's actions. It is disturbing to see such a blatant repudiation of the rule of law in legislation ostensibly concerned with the protection of human rights.

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