

Clifford, Julia (SEN)

From: Loretta de Plevitz [l.deplevitz@qut.edu.au]
Sent: Wednesday, 23 April 2003 4:25 PM
To: Legal and Constitutional, Committee (SEN)
Subject: Inquiry into the provisions of the Australian Human Rights Commission Legislation Bill 2003



SENATE.DOC (77
KB)

Dear Senators,

Please find attached my submission in relation to the provisions of the Australian Human Rights Commission Legislation Bill 2003.

Yours sincerely,
Loretta de Plevitz

Dr Loretta de Plevitz
Faculty of Law
QUT
PO Box 2434
GPO Brisbane
QLD 4001
tel: 07 3864 1103
l.deplevitz@qut.edu.au



**Submission to the Senate Legal and Constitutional Legislation Committee
Inquiry into the provisions of the *Australian Human Rights Commission
Legislation Bill 2003***

Submission by Dr Loretta de Plevitz
lecturer in law
Faculty of Law
Queensland University of Technology
GPO Box 2434,
Brisbane,
QLD 4001
tel: 07 3864 1103

23 April 2003

Summary

This submission addresses the issue of the proposed abolition of the position of Aboriginal and Torres Strait Islander Social Justice Commissioner.¹ It argues that the abolition of the position is an example of systemic racism which will have an adverse effect on Indigenous people. It is further argued that the position was set up by the Federal Government as a special measure for the advancement of the human rights of "first Australians",² and that it should not be abolished as its purpose has not yet been achieved.

The proposed restructure of the Human Rights and Equal Opportunity Commission

Pursuant to the proposed amendments to the *Human Rights and Equal Opportunity Act 1986* (Cth) envisaged by the *Australian Human Rights Commission Legislation Bill*, the Aboriginal and Torres Strait Islander Social Justice Commissioner will be replaced by Human Rights Commissioners with responsibility for monitoring the exercise of human rights of all Australians. Under this re-organisation all issues relating to those human rights protected by the suite of Federal anti-discrimination acts³ will be dealt with equally by three Commissioners. Every Commissioner will bear responsibility for the functioning of the Commission with respect to all aspects of racial discrimination and vilification, sexual discrimination and harassment and disability discrimination and harassment. On the face of it, all Australians will be provided with an equal opportunity to have their human rights promoted, monitored and protected by the Commissioners.

¹ Pursuant to the amendment repealing ss 46A and 46B *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

² The Hon Michael Duffy MP, Second Reading Speech on the *Human Rights and Equal Opportunity Legislation Amendment Bill (No 2) 1992*, 3 November 1992.

³ *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Human Rights and Equal Opportunity Act 1986* (Cth); *Disability Discrimination Act 1992* (Cth).

Equality before the law

All modern legal systems are predicated on the notion that everyone stands equal before the law. In theory therefore the proposed amendments will apply equally to all Australian citizens whose human rights are protected by the Commission. However as Anatole France ironically wrote at the end of the nineteenth century:

Another source of pride is to be a citizen! For the poor this consists of supporting and maintaining the rich in their power and their idleness. The poor must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread.⁴

Anatole France's point is that though the laws may appear neutral and apparently apply equally to everyone, they affect only the homeless, the poor and the hungry.

To give a contemporary example of systemic discrimination - in the early 1990s the State of Queensland designed a public building, the Brisbane Convention Centre. The main entrance was to be a set of steep stairs leading up from the street. All patrons would have the same opportunity to enter by the main entrance, but in fact well over 10% of Queenslanders would not be able to take advantage of this opportunity: the steep stairs would be a barrier denying access to the disabled, the aged, and people with prams and strollers. The Queensland Anti-Discrimination Tribunal held that the installation of a lift at the front entrance would benefit those people who:

would feel welcomed into a major public building and would not be excluded in fact from the principal entrance used by others. It would enhance their rightful acceptance as members of the community with equal dignity and worth and thus further the objects of the Act.⁵

The Federal anti-discrimination acts have similar objects⁶ - to promote the exercise and enjoyment of the fundamental human rights of equality and dignity.

Providing the same opportunity to all Australian citizens to have their human rights monitored by all the Commissioners apparently fulfils the objects of the legislation. The effect however is the amendments will "treat equally things that are unequal".⁷ I suggest that the proposed amendment to restructure the Human Rights and Equal Opportunity Commission will have an adverse effect on Indigenous Australians.

⁴ France *A Le Lys Rouge* Calmann Lévy, Paris, 1953 p 78. Present author's translation.

⁵ *Cocks v State of Queensland* (1994) EOC 92-612 at 77,284

⁶ see, for example, s 3 *Sex Discrimination Act 1984* (Cth); s 3 *Disability Discrimination Act 1992* (Cth).

⁷ *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 per Gaudron and McHugh JJ.

The *Cobo Report*, presented to the United Nations in 1986, identified the following features common to Indigenous peoples:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories...They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁸

The *Draft Declaration on the Rights of Indigenous Peoples, 1994* recognises there are particular human rights to which Indigenous people are entitled over and above the rights common to all human beings. These include the right to make choices which enable Indigenous peoples to retain their cultural identity and to receive respect for their cultural values, languages, traditions and forms of social organisation. To work towards the recognition and enjoyment of these human rights it is necessary to adopt culturally sensitive means of communication, and to observe Indigenous law and protocols. These approaches differ from those taken when dealing with non-Indigenous issues.

The establishment of the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner

In 1992 the Federal Parliament recognised that the existing structure of the Human Rights and Equal Opportunity Commission took no account of the special circumstances of Australian Indigenous peoples. Alerted by the findings of the Royal Commission into Aboriginal Deaths in Custody to the fact that Indigenous Australians suffered disadvantage which was qualitatively and quantitatively different from that experienced by other Australians, the Federal Government swiftly moved to create the post of Aboriginal and Torres Strait Islander Social Justice Commissioner as one of a raft of measures aimed at redressing this disadvantage.

Part IIA of the *Human Rights and Equal Opportunity Act 1986* (Cth), inserted by Act No 180 of 1992,⁹ recognises that it is necessary to focus specifically on the extent to which Aboriginal and Torres Strait Islander peoples are denied the human rights which other people of this nation take for granted, for example, the right to life (Aboriginal people die on average 20 years sooner than non-

⁸ Martinez Cobo J Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations* E/CN.4/Sub.2/1986/7/Add.4 United Nations Publication, Sales No. E.86.XIV.3, para 379.

⁹ *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* (Cth).

Aboriginal people), to good quality water (Aboriginal people in the Barclay Tablelands region have the higher rates of kidney failure in the world, to a great extent because of the high salt content of their drinking water), to hospital treatment, to education, to equality before the law, as well as rights to religious and cultural practice. One of the major functions of the Social Justice Commissioner is to report annually to Federal Parliament on the progress made towards achieving the equal enjoyment and exercise by Australian Indigenous peoples of their human rights and fundamental freedoms.

Section 46B(1) *Human Rights and Equal Opportunity Act 1986* (Cth) provides that the Social Justice Commissioner is appointed by the Governor-General. The fundamental qualification for the position is that the person have “significant experience in community life of Aboriginal persons or Torres Strait Islanders”: s 46B(2). This specific requirement recognises the particular part played by personal experience and intimate knowledge in the ability to consult and communicate sensitively and effectively with Aboriginal and Torres Strait Islander people and community organisations, and to acknowledge correct protocols in negotiation and consultation. “Experience in community life” takes into account the diversity of circumstances, not the least of which is racism, which Indigenous people face every day. As was observed by an Indigenous participant in the Australia-wide consultations on racism held by the Human Rights and Equal Opportunity Commission in 2001:

"We just live with racism every day. It's like getting up, washing your face and having a cup of tea."¹⁰

The Federal Parliament has twice recommended to the Governor-General that he appoint prominent members of the Indigenous community to the position as Social Justice Commissioner, thus fulfilling the expectation that an Indigenous appointee will best reflect the experiences and aspirations of Aboriginal people and Torres Strait Islanders. That the two incumbents have been of the highest calibre itself promotes respect for Aboriginal and Torres Strait Islander peoples.

Abolishing the designated position of Aboriginal and Torres Strait Islander Social Justice Commissioner and giving the duties and functions to a Commissioner who is non-Indigenous suggests an unthinking act of racism against the most disadvantaged members of Australian society.

That the proposed amendments themselves run contrary to the anti-discrimination legislation is a source of shame and embarrassment and a further example of the type of systemic discrimination which characterises government treatment of Aboriginal people and Torres Strait Islanders.

¹⁰ Acting Race Discrimination Commissioner *"I want respect and equality": A Summary of Consultations with Civil Society on Racism in Australia* Human Rights and Equal Opportunity Commission, Sydney, 2001, p 5.

The appointment of an Indigenous person can be seen as a special measure under the Racial Discrimination Act 1975 (Cth)

Section 9 *Racial Discrimination Act* prohibits:

any act involving distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

The appointment of an Indigenous person to the position as Social Justice Commissioner is prima facie racially discriminatory in that s 46B(2) specifically calls for a person with significant and particular experience not available to non-Indigenous Australians. However the *Racial Discrimination Act*¹¹ provides one exception - that special measures may be taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups.

The meaning of special measures is set out in Article 1(4) *International Convention on the Elimination of all Forms of Racial Discrimination* to which Australia is a signatory:

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Despite the implementation of Federal, State and Territory programs to overcome some of the problems identified by the Royal Commission into Aboriginal Deaths in Custody, overall the well-being of Indigenous peoples in this country has not improved. The Commissioner plays a unique role in Australia by testing the progress towards advancement of Australian Indigenous peoples against international standards. The Annual Reports which the Aboriginal and Torres Strait Islander Social Justice Commissioner presents to Federal Parliament identify ways in which discrimination and human rights violations particularly affect certain vulnerable groups within the Indigenous communities. For example, the 2002 Report highlights the fact that the numbers of Indigenous women in prison have increased 256% in the last 10 years. They are now incarcerated at a rate higher than any other group in Australia. The social effects of imprisoning these women, most of whom are mothers of young families, are devastating.

¹¹ section 8 *Racial Discrimination Act 1975 (Cth)*.

Article 1(4) states that special measures shall not continue after the purpose for which they were taken has been achieved. Clearly the particular purpose for which the post of Social Justice Commissioner was established by the Federal Government, to secure adequate advancement of Aboriginal people and Torres Strait Islanders, has not yet been achieved. The impairment and nullification of human rights suffered on a daily basis by Indigenous peoples continue. It would be premature to abolish the special position of Social Justice Commissioner.