

ORAL SUBMISSION BY LIZ CURRAN ON BEHALF OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC. AND THE NATIONAL ASSOCIATION OF COMMUNITY LEGAL CENTRES TO THE SENATE AND CONSTITUTIONAL LEGISLATION COMMITTEE ON TUESDAY, 11TH MARCH 1997

Who are complainants before the HREOC?

It is important to note the nature of complainants who often appear before the HREOC and Federal Court in human rights matters or matters of discrimination. The complainants are often people who by reason of their race, disability, ethnicity, gender are alleging they have been wronged in a manner contrary to the law or our human rights obligations under conventions we have signed.

The people who are complainants often find the whole process of making a complaint difficult for they will be brought together with the respondent whom they allege has perpetrated the wrong and will have to relate the often humiliating experience that has given rise to the complaint in the first instance. The clients our centres represent at HREOC are often already marginalised and impecunious. Making a complaint is therefore a fairly significant step in their lives. An informal environment and low costs make the process a viability.

Examples (these are all fictitious but reflective of the types of cases under discussion):

1. A person from an indigenous background called Fred is arrested for drunkenness, resist arrest and assault arising out of police mistreatment. Fred is called a “boong” and other adjectives by police and placed in a cell with a known racist who proceeds to break his foot.

For such a marginalised youth to complain to the HREOC about discriminatory behaviour by the police he has to overcome a distrust in the legal system, fear of retaliation by the police for the laying of the complaint. He will be nervous and frightened. With the strains on legal aid and the aboriginal legal service he may or may not have representation. At the moment there are no fees to go before the HREOC and if the matter is not settled he will be unable to pay the court costs is he cannot get an exemption from court fee payment. Fred does not understand the rules of court and finds them intimidating. With an informal cheap, accessible process and the availability of an expert who understands what a huge step making such a complaint is he may proceed. If the matter were to be heard in a court that has inbuilt capacity to deal with the case with expertise and sensitivity Fred is likely to proceed. To bring such a complaint may have consequences that modify racist practices by police and holds them up to public scrutiny and rejection and enable systemic change by police protocol modification.

2. Lee is Chinese, she has lived in Cambodia and was exposed to torture prior to her departure. She is very compliant to authority figures. She is dismissed for “poor work performance” where in reality she knows her dismissal relates to her unpreparedness to let her employer “have his way with her.” After goading from her brother Lee makes a complaint to the HREOC. It is a big step for her. Her English is limited, her financial means are virtually dissipated and she is easily intimidated. The process proposed by the new Bill may deter her from making a claim.

3. Rebecca has had mental illness. She has been employed for six years with a statutory authority. She has concealed her mental illness as she is on medication and has got her life together. One day she confides in a fellow employee, Jim, about her past illness. Two weeks later there is a phone complaint made about Rebecca. Jim mentions to his boss Rebecca's mental illness. Rebecca is dismissed immediately without opportunity to defend herself. Jim later apologises confessing that he told the boss of her illness and believes this is the reason for dismissal. Rebecca decides to take action in the HREOC. In the course of the complaint due to the stress and stigma she now feels, Rebecca suffers a relapse of her mental illness. For her the process cannot be formalised or stressful otherwise she would rather withdraw.

The main areas of the Bill that concern community legal centres are:

1. **The loss of expertise and skilled people** who continuously work in the designated area and understand the issues for example for a person with a disability and accord the requisite sensitivity.
2. **Inadequate protection of complainants against costs awards and legal costs.**
3. **Access is likely to be reduced, people are likely to be deterred from making a complaint or pursuing their complaint when pitted against resources greater than their own.**
4. **The Bill does little to rectify the Brandy predicament.** The decisions of judicial registrars are still unenforceable.
5. **The Bill will not be as "user friendly" as the current situation allows and with the likelihood** due to cuts in legal aid of more self represented complainants this could be disadvantageous.
6. **The President should not be precluded from delegating complaints functions to Commissioners.** Where the complaint goes to conciliation and then to court arrangements could be made to ensure that the same commissioner that dealt with the conciliation was not the intervener but had a replacement.
7. **The power to lodge reports before Parliament should rest with the Commission at large and not solely with the President.**

Recommendation

1. It may be some time before the Parliament has the opportunity to really make laws in relation to human rights that improve, rectify existing problems and put us in a position where our human rights law can be a model for other countries.

This opportunity for reform should therefore be used to create mechanisms which will significantly overcome existing problems. Perhaps work should be done to develop the suggested Human Rights Division of the Federal Court which brings with it expertise, informality, few costs, provision for legal assistance, is adequately resourced and has judges with particular expertise and sensitivity to human rights laws who can administer the

system with impartiality, without bias but with an awareness as to the aims of human rights instruments, their aims and objectives.

The system proposed under the Human Rights Legislation Amendment Bill 1996 may create scenarios likely to diminish access to remedies for wrongs committed under human rights law. Therefore the Bill may need more refining or a new system as proposed above could be developed.

2. There needs to be greater clarification before the Bill is adopted as to the processes to be adopted by the Federal Court in the processing and hearing of human rights and discrimination claims. Consultation with those aware of the issues effecting persons who are disadvantaged must be undertaken to ensure the Court does not further disadvantage complainants

GENERAL POINTS:

a) The transfer of many of the Commission's functions to the Federal Court in the manner proposed, raises significant questions as to the increases in costs to complainants, increased formality, lack of specialisation of registrars and judges, the options of training of the judiciary in matters of disability, mental health, and gender or race discrimination. Judges have historically tended to have less empathy and understanding of complex issues such as cultural sensitivities, gender awareness, or issues surrounding people with a disability that the Disability Commissioner, the Sex Discrimination Commissioner or Torres Strait Islander Commissioner or Race Discrimination Commission with their focussed experience and expertise.

The judiciary still remains mainly male, Anglo and the Bill will not resolve this issue in its current form. This could be rectified by a new Division of the Federal Court where appropriate mechanisms subject to the constitution are put in place. If the structures contained in the Bill are to be pursued then, more work needs to be done before the Bills implementation to ensure that the Federal Court has mechanisms in place to deal with training and eased procedures. To enact this Bill without ensuring adequate safeguards are in place in the Federal Court will only potentially add another layer of inequity for those who are seeking redress from the legal system. Any gaps in place can only serve to further disadvantage people who are trying to make a valid complaint.

b) The elimination of the specialist nature of the Commissioners takes away the input as conciliator a commissioner can have in light of that expertise. The removal of the Commissioner's role as pursuer of a complaint may expose the complainant who may be already significantly disempowered to the other vagaries imposed by the Bill which will be outlined later in this submission and act as a deterrent to a complainant to pursue their claim.

c) The costs issues is a matter community legal centres are extremely concerned about. The aim of any Bill on Human Rights should not be to reduce complaints but to ensure mechanisms exist which enable exercise of people's rights in the most efficient, fair, equitable and accessible way. This Bill if put into practice will put so many obstacles and deterrents in the way of complainants that it may make them compromise their capacity to pursue avenues open to them at law.

Legal Aid in Victoria in civil matters of which HREOC claims is one, is now virtually non-existent. VLA has sent letters to practitioners refusing legal aid in civil matters and suggesting the practitioner operate on a contingency basis. Lawyers will generally only punt a case where a huge award is likely and the issues are black and white. HREOC claims do not fit in this category. Awards are often low and the purpose of complaints is not merely for money but acknowledgment, reinstatement or to alter and change policy in a systemic manner that will often assist others similarly discriminated against. The issues are rarely black and white. Disbursements may be difficult for litigants to pay. In summary, HREOC style complaints will not get legal aid.

Furthermore, even cases which would be considered by any of you as in the public interest are being refused aid given the narrow interpretation of the Commission which is nonsensical. I can provide an example of such a case. In one case aid was refused even though the case involved an issue about the safety of public roadway users. Even though there is an exemption on filing fees in the Federal court for matters of legal aid, in light of the tightening of the guidelines, no complainant will fit into that category. Other categories for exemptions such as Austudy, Abstudy are being tightened which is likely to reduce the number of complainants who will be eligible for dispensation. The restructure of the HREOC should not be seen in a vacuum from all the other changes in our political and legal system at the moment.

The Attorney General's Office refers to the provision for financial assistance in respect of discrimination cases. Although this provision exists it is not easy for complainants to qualify. We have had some recent examples of discrimination where legal aid was refused and an application to the AG was made and refused, even though the case involved an impecunious complainant who had a disability being discriminated against by an educational institution. The case involved issues pertinent to general access from a wider group of people with disabilities. As a consequence of the lack of availability of funds the complainant compromised their complaint and others may be disadvantaged as a consequence over time.

We know on a practical level that even though there may exist waiver provisions they are often read narrowly and in themselves can provide sufficient deterrent to a client at the outset from pursuing their claim.

Further, the risk of a costs order against a complainant is a huge disincentive for them to pursue their claim. Even though the Explanatory memorandum dismisses this as cause for concern because it is also to a certain extent the current position, this is no reason why in discrimination and human rights actions a costs order should be allowed. Such a provision is against the intent of the legislation which is to promote compliance with human rights not to penalise people for trying to do so.

It is important for the Senate Committee to not just therefore be aware of how the Bill could operate in practice but also to take on board the problems in reality at the coal face.

The Refugee and Casework Service (Vic) Inc has a number of complaints before the Commission in respect of detainees at Port Hedland. HREOC has and must continue to be active in the continuing scrutiny of the detention of asylum seekers, particularly in remote areas like Port Hedland where there are few opportunities for other agencies to monitor activities. History should remain a constant reminder as to the vulnerability of detainees. *I seek to tender a letter from

RACS dated 26th February 1997 received by me.

d) The system proposed under the Bill will enable wealthy organisations aware of the financial constraints of a complainant to either refuse to conciliate and force the matter onto the Federal court with its requisite costs or place significant pressure on complainants to conciliate in a manner where for fear of matters being brought on in the Federal Court to compromise their position and the terms of any settlement. This is likely to work against the intent of any human rights legislation and is in fact an indirect form of discrimination based on absence of financial resources.

e) the increase in pressure to conciliate or mediate due to case management practices of the Federal court may lead to inappropriate conciliation in the Federal Court in matters of power imbalance, cultural inequity and to settlements that may compromise the complainants rights which have already been infringed.

f) There is a lack of resources at community legal centres to represent people in full blown Federal Court matters as opposed to the less formal environment of the HREOC. At many specialist statewide centres there may only be one lawyer who cannot afford to be court up in one Federal Court matter in light of the other casework demands across the state. With increased demands on centres due to proposed cuts in legal aid the situation is set to worsen.

g) Even though there is provision under the Bill for the Court to adopt less formal processes there is no guarantee. The difficulties of people from non English speaking backgrounds, with a mental illness or a disability will not be eased by the increased formalities of the Federal Court. The application of the complex rules of evidence in the court for increasingly unrepresented complainants eg similar fact evidence, hearsay, affidavits etc is hugely problematical. Further, the Bill allows the President to take account of other avenues available to the complainant in refusing a complaint. It should be noted that although other avenues exist eg an action in a Magistrates Court the reason the complainant with a hearing impairment may select the HREOC is because of its informality, reduced costs and sensitivity to the difficulties in bringing a claim for the hearing impaired which does not occur in the Magistrates jurisdiction.

h) The legislature should be wary about introducing criminalising provisions as in the compulsory conference provisions in s46PI. Where a complainant is in fear or afraid of attending such a conference this should be catered for not used to allow another layer of unfairness. Eg a person who has been sexually harassed and racially vilified may feel uncomfortable. An unrepresented person with an intellectual disability may be unable to produce the required documentation. Although HREOC officials under the legislation are to assist in the preparation of documents in order for this to effectively occur they must be adequately trained, staffed and the Commonwealth must commit itself to the requisite funding to do so.

I) The ability of Commissioners to appear as amicus curiae may be limited by the existing rules of court in a manner not reflective of the general good of such an action. This matter should be clarified with the Federal Court. There needs to be greater clarification before the Bill is adopted as to the processes to be adopted by the court in the processing and hearing of human rights and discrimination claims. Consultation with those aware of the issues effecting persons who are disadvantaged must be undertaken to ensure the court does not further disadvantage complainants

and is user friendly.

j) We still query the wisdom of excluding commissioners from involvement in complaints given their expertise and their non judicial nature.

k) We agree that the President must have capacity to require the court consider matters of public importance. It is critical to the effectiveness of human rights legislation that remedies be available to change the discriminatory or abusive processes in place in organisations and government departments to ensure a better system for all. And believe that similar remedies should be open to the court as is indicated in the Bill to enable systemic change.

l). The President should not be precluded from delegating complaints functions to Commissioners. Where the complaint goes to conciliation and then to court arrangements could be made to ensure that the same commissioner that dealt with the conciliation was not the intervener but had a replacement.

m). The power to lodge reports before Parliament should rest with the Commission at large and not solely with the President.

n) We are happy to see the HREOC still is to maintain its educative function and its capacity to make inquiries eg the National Inquiry Into Children and the Legal System. The Federation was involved in the process of making submissions to this inquiry and one of the outcomes for us was it drew us even closer to the issues facing children today. As a consequence of writing a submission to the HREOC Inquiry we at the Federation of Community Legal Centres have improved our services to the young homeless. This is a positive illustration of the side benefits of conducting such inquiries.

o) With the President's increasing role in the administration and management of the HREOC affairs, we hope not to see the diminution of our human rights obligations due to priority given to "fiscal management." Fiscal management may not always coexist with delivery of justice and human rights and instilling confidence of citizens in the fairness of the legal system.

p) The possible limits to the bringing of representative actions on behalf of less than seven and more than two people needs to be clarified before the Bill is passed.

R . A . C . S

Refugee Advice and Casework Service (Vic) Inc.

161 Fitzroy Street,
St. Kilda
VIC 3182
AUSTRALIA

Ph: (03) 9525 4622
Fax: (03) 9525 4673

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Ms Liz Curran
Federation of Community Legal Centres
PO Box 1139K
Melbourne 3001

Dear Liz

RE: Human Rights Legislation Amendment Bill

Just a quick note in response to yesterday's fax.

We are very concerned about the proposed restructuring of HREOC. Although we have probably not used HREOC as effectively as we could have done, RACS has made a number of complaints to the Commission on behalf of detainees in Port Hedland (one of which became fairly notorious and led to litigation between HREOC and the Department of Immigration & Multicultural Affairs about the delivery of sealed letters). In making your submission to the Senate Legal & Constitutional References Committee, you may want to mention the importance of HREOC in scrutinising the detention of asylum seekers, particularly in remote places such as Port Hedland where there are few opportunities for other organisations to obtain access to detainees and to monitor their treatment.

The idea of such people having to work their way through the Federal Court system is ludicrous. Aside from the question of filing fees (and I assume, perhaps wrongly, that there will be provision for waiver), very few of the arrivals speak any English, they frequently have little or no education and would, of course, have no idea of their rights or how to access them. I haven't seen the Human Rights Legislation Amendment Bill, so am not sure whether there is provision for 'third party' complainants. Even if there were, however, an organisation such as RACS does not have the financial capacity or the personnel to become involved in Federal Court work so would find it very difficult to get involved in this way.

I am sorry I did not make it to the Law Reform Forum today - I have only just seen the fax and thought I would dash off a few thoughts which you may want to incorporate in the submission.

Keep up the excellent work you are doing.

Yours sincerely

Jo Renshaw
Co-ordinator

