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Introduction

Let me start by saying that Australia is a culturally diverse society with 23% of Australians being born overseas. Amongst others, there is a sizeable Polish community and, as you may hear from my accent, I myself was born in Poland.

The Human Rights and Equal Opportunity Commission (HREOC) is an independent statutory authority established by the Federal Parliament by the Human Rights and Equal Opportunity Act, 1986.

My appointment to the HREOC was made by the Governor-General, on recommendation of the Prime Minister, and is for a 5 year term. As Human Rights Commissioner I monitor and protect Human Rights in Australia, and as Acting Disability Discrimination Commissioner, I monitor and protect the rights of people with disabilities.

To fulfill these functions HREOC can undertake many activities, from human rights education to inquiries into “acts and practices” of Federal government departments to ensure their consistency with the human rights as defined by our legislation.

HREOC also investigate and settle complaints from individuals alleging that their rights were infringed by, for example, service providers, employers or Government departments. The complaint area involves extensive work in an attempt to conciliate complaints.

Introduction of Anti-Discrimination Legislation

When it came to introducing “equality” and “anti-discrimination” legislation, I believe it is fair to say that the Australian experience with industrial conciliation mechanisms paved the way for the kind of operational procedures that were adopted by the resulting oversight bodies.

The Federal Government made the first foray into this arena in 1975 with the introduction of the Racial Discrimination Act, which embodied the International Convention on the Elimination of all Forms of Racial Discrimination. It is interesting to note that in the vigorous parliamentary debate accompanying this legislation, concern was expressed as to whether “conciliation” alone, without additional powers of sanction, would suffice in the fight against racial discrimination.

In the end “conciliation” was emphasized as the primary means of settling disputes but the Commissioner was also empowered to call compulsory conferences if necessary. A similar outcome to the previously mentioned industrial conciliation procedures!!

Role of Federal Ombudsman

The Federal Government’s next legislative push occurred in 1976 with the Ombudsman Act. [1] The Ombudsman’s role is to promote improved public administration and to investigate complaints from people who believe they have been adversely affected by the defective

administration of Federal government departments. In other words the complaint is directly linked to the day to day functions of a particular government department.

Tools used by the Ombudsman include investigation of the circumstances of the complaint, conciliation and in the event of maladministration causing loss – recommendation of financial compensation.

As I intend to deal with the balance of the Federal equality and human rights legislation in some detail later in my speech, I will leave this subject for the time being and turn briefly to the situation that exists in the States.

State based Anti-Discrimination provisions

All the state governments of Australia have enacted anti-discrimination legislation. The South Australian Sex Discrimination Act came into operation in 1976 and the Equal Opportunity Act in 1984. New South Wales and Victoria enacted Anti- Discrimination Acts in 1977. Western Australia enacted an Equal Opportunity Act in 1984 while Queensland and Tasmania enacted Anti-Discrimination legislation in 1991 and 2000 respectively.

The common element in all the State legislation is the recognition that disputes involving complaints of discrimination should, where possible, be resolved other than by a formal adversarial hearing. However methods to be used in conciliation are not prescribed nor is conciliation defined.

As “conciliation” has now been placed at the very heart of my brief overview of this important field of human endeavor, I believe it is appropriate to spend some time examining exactly what a successful working model looks like.

Federal Human Rights and Equal Opportunity Commission’s Complaint Handling Powers

I will therefore, now turn to a more detailed examination of the Federal Human Rights and Equal Opportunity Commission (HREOC) and the methods it uses in attempting conciliation outcomes.

Along with its educational and policy development roles, HREOC is responsible for the investigation and conciliation of complaints under the *Human rights and Equal Opportunity Commission Act 1986, the Racial Discrimination Act 1975, the Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992.*

The legislation provides for complaints of alleged discrimination or alleged breaches of human rights to be lodged with the Commission, through the President, who is the statutory officer holder responsible for the complaint handling function. The President, with the assistance of the officers of the Commission’s Complaint Handling Section, inquire into the complaints and after an appropriate level of inquiry decide whether to terminate the complaint or attempt to settle the complaint through conciliation.

Under the legislation the President may terminate a complaint of alleged unlawful discrimination on the following grounds: [2]

(a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;

(b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;

(c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;

(d) in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;

(e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;

(f) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;

(g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;

(h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court;

(i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Complainants who allege unlawful race, sex or disability discrimination and whose complaint is terminated by the President because it cannot be resolved by conciliation or for one of the reasons outlined above, may apply to have their complaint heard by the Federal Court of Australia or the Federal Magistrates Service.

The complainant must be issued with a Notice of Termination by the President of the Commission before they can initiate Court proceedings and they must initiate the proceedings within 28 days of the date of the Notice of Termination.

Complaints lodged under the *Human Rights and Equal Opportunity Commission Act 1986* concerning discrimination in employment or a breach of human rights by the Commonwealth, which cannot be conciliated may, after the issue of a Notice by the President, be made the subject of a report to the Attorney-General for presentation to Parliament.

This difference in approach reflects the failure of the *Australian Bill of Rights Bill (1985)* to achieve Federal parliamentary approval in 1986. If successfully enacted, this Bill would have given Australian domestic legal status to the previously ratified International Covenant on Civil and Political Rights. With the entrenchment of these basic rights into the domestic Australian fabric, the Human Rights and Equal Opportunity Commission would have been able to investigate complaints of human rights' breaches by government departments in a similar way to the Federal Ombudsman.

Complaint Handling – How it Works

Returning now to the anti-discrimination provisions, it must be kept in mind that one of their major objectives is, where appropriate, to provide an opportunity for complainants and the party against whom the complaint is made to attempt to resolve the complaint through conciliation. This

alternate dispute resolution process is seen as a quick and less costly alternate to the more formal and determinative legal proceedings available, should the complaint be terminated.

The process provides an opportunity for the parties to hold a frank discussion about the complaint, in an attempt to resolve the matter through negotiation. It gives the parties an opportunity to resolve the matter on their terms which is usually in private and on a confidential basis.

The role of the conciliator is as a neutral third party, conducting the conference in a fair and impartial manner. The conciliator is not acting on behalf of either party. The conciliator gives each party an opportunity to present their views and ensures the conduct of the proceedings takes place in a safe environment and observes the principles of procedural fairness but recognizing power imbalances and the issues of substantive versus formal equality.

Critics argue that the individualised and confidential nature of conciliation settlements mean that systemic discrimination is not addressed, that discriminatory acts are hidden from public scrutiny and accordingly, that any potential for broader social change is diffused. Criticisms also focus on the potential for power imbalances in the process with those who are less articulate, less assertive and have less emotional and financial resources (usually complainants) being disadvantaged in the negotiation process.

Additionally, it is claimed that limited public information on past settlement terms combined with the 'neutral' role of the conciliator results in complainants accepting settlement terms far below what could be achieved at public determination.

Strategies employed by Commission conciliators to enable substantive equality of process include:

- providing information about process in a manner which ensures, as far as possible, that parties have an equal understanding of the process, possible advantages and disadvantages of the process and available alternatives;
- providing parties with information about external resources that may assist them during the conciliation process if it appears that such assistance is required to enable equal participation;
- adaptation of the process to enable parties to participate on substantively equal terms, for example by increasing the informality of the process or utilising techniques such as shuttle conferencing;
- provision of interpreters or other aids where necessary to enable adequate participation;
- control of attendance and process;
- control of the physical environment to ensure environmental aspects do not exacerbate power imbalances. [3]

The National Alternate Dispute Advisory Council (NADRAC) defines statutory conciliation as:

"Statutory conciliation is a process in which the parties to a dispute which has resulted in a complaint under statute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted and may make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage the participants to reach an agreement which accords with the requirements of that statute". [4]

The process that is generally used in statutory conciliation employs either the interest based negotiation (IBN) or adversarial model. [5]

It is generally agreed that IBN is an approach to conciliation that is intended to take the interests of both parties into account when guiding them to agreement. [6] This approach lends itself to a more structured process that focuses on identifying interests, exploring options and the use of a process to resolve a dispute [7]. In taking this approach a conciliator is required to spend considerable time before the conciliation conference preparing and counselling parties towards "a fair and just agreement" . [8]

It is often contended that IBN is better suited to complex dispute situations where a relationship needs to be maintained and where interest based strategies can be employed to fully explore all of the layers of a dispute so that resolution of the dispute can be complete in every sense.

It then flows logically that IBN is better suited to negotiations where a complainant is still in an employment relationship or perhaps in an ongoing relationship with an essential service provider. It has been argued that this approach is best suited to a dispute where both parties stand to gain some tangible benefit from resolution of the complaint: a "win win" outcome. [9]

The adversarial conciliation model is usually looked at as an unpleasant alternative to the interest based model. [10] As pointed out by Buckley [11], *"adversarial bargaining can be difficult, confronting and unpleasant and an aversion to it is probably the source of the fervour that grips many writers and theorists on negotiation".*

The adversarial approach focuses on positions, with the complainant typically asking for much more than they expect to receive. The respondents generally open with much less than they expect to have to give. As Buckley notes, the typical pattern is for each party to make progressively smaller concessions until an agreement is reached or neither party will move any further.

Parties are focussed on winning, not in caring for or understanding the interests or perspectives of the other party. This situation is typical of complaints where a financial outcome is sought by the complainant, as the only form of redress, and there is no ongoing relationship with the other party.

The experience of the Commission is that financial compensation is a common outcome in the resolution of discrimination complaints. This particularly appears to be the case concerning complaints that arise in the course of a person's employment such as complaints of sexual harassment and racial discrimination.

Outcomes of conciliation for matters relating to disability discrimination tend to lend themselves to more policy or action plan oriented resolution, such as the commitment to install a lift to an otherwise inaccessible building or an undertaking to better communication in relation to a child's education.

The practice of ADR in the context of anti-discrimination and human rights is an area of ongoing interest for academics and practitioners because it is a context fraught with contradictions. Firstly the client group serviced by the law tends to be those that would most benefit from a more informal and accessible system of dispute resolution and yet inherent in the context is the possibility of significant power imbalances between the parties and delivery of a form of inferior justice to already disadvantaged groups. Additionally, it is a context in which the public interest dimension of the legislative framework can be seen to clash with traditional ADR and legal concepts of neutrality and impartiality. [12]

Application of the principals outlined above have resulted in the following statistics concerning HREOC's complaint handling capacities in 2001-2002:

- 1271 complaints were received

- 1298 complaints were finalised
- 30 percent of finalised complaints were conciliated
- 88 percent of complaints were finalised within 12 months of lodgement.

Historically HREOC has found that a conciliation rate of 30 percent is an appropriate performance measure; considering the length of time the organisation has been operating and the total number of complaints received, I believe this provides an excellent comparative figure for like-minded organisations.

The different grounds for complaint under HREOCA produced the following percentage breakdowns in 2001-2002:

- 36% of complaints were lodged under the Disability Discrimination Act;
- 31% under the Sex Discrimination Act;
- 18% under the Human Rights and Equal Opportunity Act and
- 15% under the Racial Discrimination Act

I will now take you through some case study examples that amplify each of the above: [13]

Alleged discrimination on the ground of race in the provision of goods and services

The complainant advised that his wife is of Russian background and does not read, write or speak English. The complainant alleged that he was vilified because of wife's racial background when he contacted the respondent state government department to enquire, on his wife's behalf, about obtaining a particular qualification. The complainant alleged that a female officer answered his call and when he advised the officer that his wife was Russian, the officer said "Oh! A mail order bride eh!" The complainant also alleged that the department discriminated against his wife in that study guides for the qualification are not published in Russian.

The department advised that due to budgetary constraints study guides are not published in various languages and the department was of the view that non-provision of the material in Russian did not constitute discrimination on the ground of race. The department concurred that during a telephone conversation, a part-time Client Relations Consultant had made the alleged statement to the complainant in response to the complainant advising the consultant that he had a "Russian bride".

The complaint was resolved by conciliation with the department agreeing to pay the complainant $1 000 compensation for hurt and humiliation and the Client Relations Consultant agreeing to provide a written apology to the complainant.

Alleged pregnancy discrimination under Sex Discrimination provisions

The complainant stated that she was not aware that she was pregnant when she applied for work as a receptionist/clerk with a real estate agency. She claimed that soon after she commenced work she advised her supervisor that she was pregnant and that her supervisor suggested that

she have an abortion. The complainant alleged that when she advised her supervisor that she had decided to proceed with her pregnancy her employment was terminated.

The respondent company denied that it had discriminated against the complainant on the basis of her pregnancy. The company claimed that the complainant's employment was terminated because she would have required a period of maternity leave long before any normal holiday entitlements would have accrued and at a time when other staff would have also been on leave. The respondent advised that an additional reason was that the complainant intended to move to a remote location and commute to the city office which was seen to be an untenable situation.

The complaint was resolved at conciliation with the respondent company agreeing to pay the complainant $4 000 in general damages and to reinstate her to her former employment

Alleged disability discrimination in appointment to employment

The complainant is employed in the Commonwealth public service. In early 2001, the complainant developed acute synovitis of both arms and consequently underwent a successful rehabilitation program. In late 2001, the complainant was informed that her application for a position with the respondent department was successful, but appointment to the position was contingent on a successful medical assessment.

The medical assessment declared that the complainant was not medically capable of performing the required duties on a full-time basis (seven hours per day). At the time of the medical assessment, the complainant was in the final stages of her rehabilitation program and working six hours per day. The respondent declined to appoint the complainant to the position on the basis of the medical assessment. Two weeks after the medical assessment, the complainant returned to full-time hours.

The complaint was successfully resolved at conciliation with the respondent agreeing to provide the complainant with an apology, to seal the medical assessment report and pay the complainant compensation of $6 160.

Complaint of discrimination under Human Rights on the ground of criminal record

The complainant claimed that he had applied for a job with the respondent state government authority as a deckhand. He was later advised that his application was unsuccessful because he had a criminal record for possession of marijuana in May 1998.

Prior to the President formally writing to the respondent, the matter was resolved with the respondent reversing its decision and advising the complainant that he would be considered for the next available position.

Conclusion

In conclusion, it is clear that “alternate dispute resolution” has a long and honourable tradition in Australia albeit sometimes travelling under the *nom de plume* of “conciliation and arbitration”. It has always been recognised that legal remedies, while necessary, can be expensive and time consuming, whereas ADR provides the opportunity for outcomes that are affordable, understandable and perhaps less bruising to the participants. It is certainly a system that has enjoyed great success in the “equality rights” field and while the impact in the human rights arena may be more subtle, it is still very discernable.

The final word should go to Hilary Astor and Christine Chinkin from their ground-breaking work: “Dispute Resolution in Australia” [14] : At the beginning of the new century Australia has become a jurisdiction that is developing a more sophisticated understanding of the uses and limitations of ADR according to diverse contexts. Australia has responded to its own needs and made innovations where appropriate. There is less of a tendency than there was a decade ago to follow in the footsteps of other jurisdictions”.

Thank you.

1. Many State Governments have also legislated to create Ombudsman roles with authority to examine the operation of State Government Departments’ service delivery.

2. Human Rights and Equal Opportunity Commission Act 1984 section 46PH(1)

3. Raymond and Ball, op.cit.

4. National Alternative Dispute Resolution Advisory Council, “ADR Definitions Paper”, 1997.

5. Paula Gonzalez and Karen McCabe “Giving them what they want – Challenges in using the adversarial and interest based models of statutory conciliation”. A paper presented to the 6th National Mediation Conference,18 -20 September 2002, Canberra, Australia by HREOC Senior Investigation Conciliation Officers.

6. Gonzalez and McCabe - op.cit

7. Fisher and Ury, “Getting to Yes: Negotiating Agreement Without Giving In”, NY, Penguin Books, 1991, p.21.

8. Williams, “Legal Negotiation and Settlement”, West Publishing Company 1983, p.48.

9. McCabe and Gonzalez - Ibid

10. McCabe and Gonzalez -Ibid

11. Ross P Buckley, “Adversarial Bargaining: the Neglected Aspect of Negotiation”, Australian Law Journal, Volume 75, pp 183.

12. Raymond and Ball, Ibid.

13. The Human Rights matters that could not be conciliated and were reported to the Attorney-General for parliamentary tabling in 2001-2002 are outlined below:

HREOC Report No. 14

Report of an inquiry into a complaint by Mr Andrew Hamilton of age discrimination in the Australian Defence Force (January 2002)

This Report is of an inquiry conducted prior to the commencement of the Human Rights Legislation Amendment Act 1999 (No.1) (Cth) by the former Human Rights Commissioner. The inquiry dealt with a complaint of discrimination in employment concerning discrimination on the ground of age against the Commonwealth of Australia (Australian Defence Force). The Human Rights Commissioner found that the Australian Defence Force had discriminated against Mr Hamilton on the basis of his age.

In particular, the Human Rights Commissioner found that:

in placing the complainant in Promotion Band D at the June 1995 Promotion Board the respondent engaged in an act of age discrimination the decision to place the complainant in Promotion Band D was based on a distinction, exclusion or preference on the ground of age which had the effect of nullifying or impairing the complainant's equality of opportunity or treatment in employment or occupation the distinction, exclusion or preference was not based on the inherent requirements of the job.

HREOC Report No. 15

Report of an inquiry into a complaint by Ms Elizabeth Ching concerning the cancellation of her visa on arrival in Australia and subsequent mandatory detention (February 2002)

This Report is of an inquiry into a complaint by Ms Ching that her human rights were breached when she was questioned by *Department of Immigration and Multicultural Affairs* (DIMA) officials on her arrival at Brisbane airport, and her subsequent custody at the Brisbane Women's Correctional Centre. The President found that some aspects of Ms Ching's treatment were inconsistent with or contrary to her human rights.

In particular, the President found that:

the act by an officer of DIMA of requiring Ms Ching to provide a response to the notification of the likely cancellation of her visa within a period of ten minutes was in breach of the requirement in article 13 of the International Covenant on Civil and Political Rights ("ICCPR") which provides that an applicant be allowed to submit the reasons against expulsion.

the act by an officer of DIMA not to advise Ms Ching that she was able to seek legal advice or assistance had the effect that Ms Ching was not able to exercise her rights pursuant to article 13 of the ICCPR to have her case reviewed before a competent authority and to be represented for the purpose of having her case reviewed before a competent authority and therefore amounts to an act which is inconsistent with or contrary to her human rights.

HREOC Report No. 16

Report of an inquiry into a complaint by Mr Hocine Kaci of acts or practices inconsistent with or contrary to human rights arising from immigration detention (May 2002)

This Report concerns an inquiry into a complaint made by an asylum seeker, (Mr Kaci), who had been transferred from an immigration detention centre to a remand centre as a result of alleged unacceptable behaviour. Mr Kaci alleged that the conditions in which he was detained were contrary to the ICCPR. The President found that the conditions of Mr Kaci's detention were in breach of article 10(2) of the ICCPR.

In particular, the President found that:

asylum seekers in immigration detention, as unconvicted persons, should be treated in a different manner to convicted prisoners. Article 10(2) of the ICCPR obliges Australia to ensure that unconvicted persons are subject to separate treatment appropriate to their status unconvicted persons in detention are entitled to a "special regime" of treatment as outlined in Part II, Section C of the UN Standard Minimum Rules for the Treatment of Prisoners.

HREOC Report No. 17

Report of an inquiry into a complaint by the Asylum Seekers Centre concerning changes to the Asylum Seekers Assistance Scheme (May 2002)

This Report concerns an inquiry into a complaint by the Asylum Seekers Centre alleging that changes to the Asylum Seekers Assistance Scheme made by the Department of Immigration, Multicultural and Indigenous Affairs had breached the human rights of people seeking asylum in Australia. The first changes complained of produced the result that asylum seekers are no longer eligible for the Scheme if their application is being reviewed by the Refugee Review Tribunal. New criteria governing exemptions from the Scheme's waiting period were also introduced. Further revision of the criteria for exemption from the waiting period was made a short time after the initial changes. The Human Rights Commissioner found that the changes made to the Asylum Seekers Assistance Scheme were in breach of articles 3 and 24(2)(d) of the Convention on the Rights Of the Child ("CROC") and article 26 of the ICCPR.

In particular, the Human Rights Commissioner found that:

the best interests of the child were not a primary consideration in making the changes to the scheme, and thus article 3 of CROC had been breached at a minimum, Australia is required to provide all pregnant women with ongoing assistance and information in relation to their pregnancy. The changes to the scheme resulted in a number of pregnant asylum seekers being denied "appropriate prenatal care", and the changes were in breach of article 24(2)(d) of the ICCPR

the changes to the scheme were discriminatory and in breach of article 26 of the ICCPR.

HREOC Report No. 18

Report of an inquiry into a complaint by Mr Duc Anh Ha of acts or practices inconsistent with or contrary to human rights arising from immigration detention (May 2002)

This Report concerns an inquiry into a complaint made by Mr Ha, an immigration detainee, regarding his transfer to a maximum security prison, and his subsequent detention in that prison. The President found that his transfer to a maximum security prison, and his subsequent detention in that prison, was contrary to articles 9(1), 10(1) and 10(2)(a) of the ICCPR.

In particular, the President found that:

the lack of access to recreational facilities, locking of Mr Ha in his cell for 22 hours a day, denial of an opportunity to work, and failure to provide time to exercise all amounted to a breach of article 10(1) of the ICCPR the transfer of Mr Ha to a maximum security prison, and failure to accord him treatment appropriate to his status as an unconvicted person constituted a breach of article 10(2)(a) of the ICCPR the failure to consider whether or not Mr Ha could be segregated from convicted prisoners was in breach of article 10(2)(a) of the ICCPR Mr Ha's detention was arbitrary, unjust and inappropriate in the circumstances, and thus in breach of article 9 of the ICCPR.

Dispute Resolution in Australia – Second Edition by Hilary Astor – Abbott Tout Professor of Litigation and Dispute Resolution Sydney University and Christine Chinkin – Professor of International Law London School of Economics. Published by LexisNexis B