



**SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT**

Senator the Hon Sue Lines
President of the Senate
Parliament House
CANBERRA ACT 2600

Dear President

I write in relation to the motion moved by Senator Cash on 29 November 2023, requiring the Minister representing the Attorney-General to table documents relating to the Australian Human Rights Commission's (AHRC's) appearance in the High Court in the matter of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (NZYQ) (order number 413 of 2023).

Six documents pursuant to paragraphs (a) and (b) of the Order are enclosed, with an index in **Schedule A**.

Redactions have been made to remove material that is not in the public interest to reveal, as doing so may prejudice the Attorney-General's Department's ability to provide frank and fearless advice to the Attorney-General, may prejudice the Commonwealth's interests in managing ongoing and future legal matters involving the Commonwealth, and may reveal names and contact details of departmental officers. Four documents, which fall within the scope of paragraph (a) of the Order, have not been provided on the same basis.

The Attorney-General or the Attorney-General's Department do not hold documents sought under paragraph (c) of the order.

Yours sincerely

SENATOR THE HON MURRAY WATT

30/11/2023

Encl. Documents for production

Schedule A

Document number	Description
1	Letter from the President of the AHRC to the Attorney-General, dated 22 May 2023
2	MS23-000656 – Submission from the Attorney-General’s Department to the Attorney-General
3	Attachment to the Submission – Tied Work Constitutional Work Exemption, dated 8 June 2010
4	MS23-000656 – Submission signed by the Attorney-General
5	Covering email – Letter from the Attorney-General to the President of the AHRC, dated 5 June 2023
6	Letter from the Attorney-General to the President of the AHRC, dated 5 June 2023



Australian
Human Rights
Commission

President
Emeritus Professor Rosalind Croucher AM

22 May 2023

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

By email: [@ag.gov.au](mailto:ag.gov.au)

Dear Attorney

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs
High Court proceeding S28/2023

The Commission has made a decision to seek leave to intervene or appear as *amicus curiae* in the above proceeding, exercising our statutory function under s 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

That intervention is likely to involve tied constitutional law work. I seek your approval under paragraph 3B of Appendix A of the Legal Services Directions 2017 to use in-house lawyers and external counsel for the conduct of any necessary constitutional law work to enable the Commission to make submissions to the High Court and to appear at the hearing of the proceeding if granted leave by the Court.

Background

The defendants to this proceeding are the Minister for Immigration and the Commonwealth. The plaintiff intends to ask the High Court to either overrule or distinguish its previous decision in *Al-Kateb v Godwin* (2004) 219 CLR 562. The defendants consider there is a reasonable prospect that the parties will be able to agree a special case, including ultimate facts that would raise the correctness of *Al-Kateb* if leave were granted to reopen that decision.

As you know, in *Al-Kateb* the High Court held by a 4:3 majority that ss 189, 196 and 198 of the *Migration Act 1958* (Cth) authorised and required the detention of an unlawful non-citizen even if his removal from Australia was not reasonably

practicable in the foreseeable future. The decision is controversial from a human rights perspective because of the potential it creates for arbitrary and indefinite detention, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). The majority of human rights reports provided by the Commission to you and your predecessors as Attorney-General, pursuant to our statutory function under ss 11(1)(f), 20 and 20A of the AHRC Act relate to claims of arbitrary detention by people held in immigration detention facilities.

The Commission has formed the view that this proceeding meets its intervention guidelines.¹ The proceeding involves an 'intervention issue' because it deals with the right to liberty and, in particular, freedom from arbitrary detention under article 9 of the ICCPR. The intervention issue is central to the proceeding because the proceeding involves the interpretation of sections of the Migration Act that provide for the mandatory detention of unlawful non-citizens. The resolution of this issue will have implications not only for this plaintiff but for other people who have been kept in immigration detention for prolonged periods and who have been denied a visa but cannot be removed from Australia.

Experience of the Commission

The High Court has shown that it is assisted by the Commission's submissions by regularly granting us leave to appear as *amicus curiae* in the limited number cases where such applications are made.

The Commission was granted leave by the Court to appear in *Al-Kateb*, and also in two contemporaneous cases that dealt with related issues: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 and *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1.

More recently, the Court has granted the Commission leave to appear in a number of other cases that also involve the right to liberty in the context of immigration detention. These include: *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; and *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

¹ Australian Human Rights Commission, *Intervention in court proceedings: The Australian Human Rights Commission Guidelines* (2009). At <https://www.humanrights.gov.au/intervention-court-proceedings-australian-human-rights-commission-guidelines>.

The Commission's intervention function under s 11(1)(o) of the AHRC Act may only be exercised in proceedings that involve human rights issues. We are judicious in the exercise of this function. Since 2010, for example, we have sought leave to intervene in two to three cases per year, on average, across all jurisdictions. In that period, we have appeared in 13 cases in the High Court, approximately one per year. Not all of those High Court cases involved constitutional law issues.

The Commission takes the position that it will only seek leave to intervene in a proceeding if it will contribute something useful and different from the other parties and interveners. If it appears during the Commission's preparation that the issues it proposes to raise have been adequately and fully addressed by the parties or other interveners, the Commission will not seek leave to intervene or alternatively may not utilise leave granted to it.

Legal services directions

The Commission has a general approval pursuant to paragraph 3B of Appendix A to the Legal Services Directions 2017 to allow it to undertake tied public international law and constitutional law work, subject to certain conditions. The current approval to undertake constitutional law work was granted by the Hon Robert McClelland MP on 8 June 2010 and has remained in the same form since then.

Relevantly, the general approval to undertake tied constitutional law work is limited to forums other than the High Court. In order to use in-house lawyers, rather than the Australian Government Solicitor, for constitutional law work in the High Court, a further approval is required on a case-by-case basis.

Since at least 2010, the consistent practice of Attorneys-General on both sides of politics has been to grant the Commission approval to use its own lawyers, rather than AGS, to undertake the necessary tied constitutional law work to intervene in human rights cases in the High Court that involve constitutional law issues. This has included cases with high political sensitivities for the Australian Government such as: the validity of a regulation requiring an ASIO security clearance as a criterion for a protection visa (*Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1), the validity of mandatory minimum sentences for people smuggling (*Magaming v The Queen* (2013) 252 CLR 381), the detention of asylum seekers at sea (*CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514), the scope of free speech protections for Commonwealth public servants (*Comcare v Banerji* (2019) 267 CLR 373), and the validity of a warrant relied on to raid the home of a journalist (*Smethurst v Commissioner of Police* (2020) 272 CLR 177).

In all of these cases another Commonwealth party was involved and the AGS was already engaged in acting for them. In all of these cases, the High Court granted the Commission leave to intervene or appear as *amicus curiae*, and the then Attorney-General approved the Commission's use of its internal lawyers and external counsel to do the necessary constitutional law work.

In two cases in 2019 and 2022, for the first time in the institutional memory of the Commission, the Commission was refused approval by the then Attorney-General to use its own lawyers for constitutional law work. In each of those cases, the Commission still sought leave to appear pursuant to its statutory function, that leave was granted by the High Court, and the Commission limited its submissions to non-constitutional law issues.

The first case in which approval under the Legal Services Directions was refused was *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285. That case also involved a proposed challenge to *Al-Kateb*, although the issue was not ultimately reached by the Court in its reasons for decision. It was not suggested by the then Attorney-General that the proceeding did not involve human rights issues, or that the Commission was not properly seeking to exercise its statutory intervention function. Instead, in a letter to me on 4 January 2019, the then Attorney-General, the Hon Christian Porter MP, raised the concern that, if leave were granted, the Commission may 'argue positions on constitutional issues that may diverge from the Commonwealth's general position' and that this would not assist the Court.

I was particularly concerned by this response because it seemed to misunderstand both the role of the Commission as an independent statutory agency with a mandate grounded in human rights, and the Commission's statutory intervention function. In that case, the Commission *did* intend to make submissions that were different from those of the Australian Government. It is clear, for example from the 4:3 decision in *Al-Kateb*, that there is scope for different views on constitutional issues properly to be formed. The (non-constitutional) submissions ultimately made by the Commission, like all of our submissions, made clear that they were not made on behalf of the Commonwealth. Further, the question of whether those submissions were, or might be, of assistance was, pursuant to the AHRC Act, one for the Court to decide. I set out those concerns in a letter to the then Attorney-General on 7 January 2019.

The second case in which approval was refused was *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, High Court proceeding S192/2021. As you know, the Commonwealth ultimately

discontinued that proceeding. Our request for approval to use our own lawyers in that case referred to our statutory intervention function and also to the particular statutory role given to the Aboriginal and Torres Strait Islander Social Justice Commissioner. On 4 March 2022 the then Attorney-General, Senator the Hon Michaelia Cash, refused the approval sought by the Commission. Senator Cash, surprisingly, said that her decision was consistent with longstanding practice. I replied to Senator Cash's letter on 8 March 2022.

Request for approval

As noted at the outset of this letter, I seek your approval to use in-house lawyers and external counsel for the conduct of the necessary constitutional law work to enable the Commission to make submissions to the High Court and to appear at the hearing of this proceeding.

More generally, I would welcome the opportunity to discuss with you in more detail the nature of the current approvals given to the Commission to do tied work, and whether any amendment to those arrangements is required.

The plaintiff in the present proceeding has proposed that written submissions from interveners in support of the plaintiff be due by 23 June 2023. I would appreciate your response to the Commission's request by 9 June 2023.

Yours sincerely

Emeritus Professor Rosalind Croucher AM
President

T:
E:

Cc: Civil Law Unit, Attorney-General's Department (AGD)
Office of Legal Services Coordination



Office of the **Hon Mark Dreyfus KC MP**
Attorney-General
Cabinet Secretary

MINISTERIAL SUBMISSION COVER SHEET

Ministerial Submission Details			
Sub No:	MS23-000656	Date Sent to AGO:	5 June 2023
Deadline:	9 June 2023 – to provide the Australian Human Rights Commission (AHRC) sufficient time to prepare submissions if the tied work exemption request is granted.		
Title:	Australian Human Rights Commission request for tied work approval - <i>NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs</i>		
Business Unit / Agency:	BRCH-IIG-LSRCD-Office of Legal Services Coordination		
Purpose/Objective:	<input checked="" type="checkbox"/> For Approval/Signature/Agreement <input type="checkbox"/> For Info/Noting		
Attorney-General's Office Use			
Responsible AGO Adviser:			



Sub No: MS23-000656

Date submitted to Office by AGD: 5 June 2023

File No: 23/10404

Min No: N/A

ATTORNEY-GENERAL

Australian Human Rights Commission: request for tied work approval - *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*

Deadline: 9 June 2023 – the President of the Australian Human Rights Commission (AHRC) has requested a response by that date to allow the AHRC sufficient time to prepare and file written submissions (as an intervener) by the High Court's deadline of 23 June 2023.

Recommendation: I recommend that you:

[REDACTED]

.....
Attorney-General
/ /2023

AG Comments

Key Issues: On 22 May 2023, the President of the AHRC, Emeritus Professor Rosalind Croucher AM, wrote to request your approval for a tied work exemption under paragraph 3B, Appendix A of the *Legal Services Directions 2017* (the Directions) for the AHRC to use in-house lawyers and external counsel to undertake necessary constitutional work to allow the AHRC to intervene to make submissions and appear in the matter of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (NZYQ)* in the High Court (Attachment B).

The President of the AHRC has also indicated that she wishes to meet with you to discuss the existing tied work arrangements that the AHRC is subject to under the Directions (including whether any amendments are required to them). The department will engage with your Office separately about this.

Background information

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs

The Solicitor-General has been briefed to appear for the Commonwealth in this matter.

The plaintiff arrived in Australia in 2012 as an unauthorised maritime arrival. He is a stateless Rohingya Muslim from Rakhine State in Myanmar and asserts that Australia recognises that he is owed protection obligations. His application for a protection visa was refused by a delegate of the Minister on 30 July 2020 pursuant to section 36(1C)(b) of the *Migration Act 1958* (Migration Act). His application was refused on the basis that he had been convicted of a serious crime and was on reasonable grounds considered by the Minister to be a danger to the Australian community. The plaintiff remains in immigration detention – he cannot be released into the community due to the visa refusal and he cannot be removed from Australia as he is not a citizen of Myanmar, does not have any right to reside there and does not hold citizenship of any other country.

The plaintiff seeks to have the High Court overrule or distinguish its previous decision in *Al-Kateb v Godwin* (2004).

In *Al-Kateb*, the issue before the High Court was whether the Migration Act authorises the indefinite detention of unlawful non-citizens for the purposes of removal, in cases where there is no prospect of removal from Australia in the reasonably foreseeable future and, if so, whether relevant provisions of the Migration Act are constitutionally valid. The High Court held by a bare majority that the relevant provisions of the Migration Act authorised and required the detention of an unlawful non-citizen, even if removal from Australia was not reasonably practicable in the foreseeable future, and were consistent with Chapter III of the Constitution.

Further information is available in the Significant Issues Report (Attachment C).

The tied work regime under Directions Under the Directions, constitutional law work is tied to the Australian Government Solicitor (AGS) and the department. [REDACTED]

[REDACTED] Under paragraph 3B of Appendix A to the Directions, the Attorney-General may give approval for a legal services provider other than a tied provider to undertake tied work. [REDACTED]

[REDACTED] Such an approval may be subject to certain conditions (such as a tied provider clearing draft submissions). The authority to approve a non-tied provider to undertake tied work is delegated down to specified EL2 officers within the department. However, past practice has seen ‘standing’ approvals and particularly sensitive requests considered by the Attorney-General personally.

Basis of the AHRC’s intention to intervene

The AHRC seeks to intervene or appear as *amicus curiae* under paragraph 11(1)(o) of the *Australian Human Rights Commission Act 1986* (AHRC Act). Under paragraph 11(1)(o) of the AHRC Act, the AHRC has a statutory function to intervene in proceedings that involve human rights issues, such as immigration detention.

As a general rule, the AHRC will only intervene in a matter which raises significant human rights considerations. The AHRC considers that *NZYQ* satisfies its intervention guidelines as it deals with the right to liberty and freedom from arbitrary detention under Article 9 of the *International Covenant on Civil and Political Rights*.

AHRC’s standing exemption under the Directions

The AHRC has a standing exemption under the Directions, granted in 2010 by then Attorney-General the Hon Robert McClelland MP, from the obligation in Appendix A for constitutional law work to only be undertaken by tied providers (Attachment D). The exemption allows the AHRC to use its in-house lawyers and engage external lawyers, subject to conditions, to undertake constitutional law work in forums other than the High Court.

[REDACTED]

[REDACTED]

The AHRC has a separate standing exemption under paragraph 5 of the Directions, allowing it to use in-house lawyers as solicitors on the record in court proceedings at all levels.

Further information about previous tied work requests for the AHRC to make constitutional arguments in the High Court is set out in Attachment E.

Considerations relevant to whether exemption should be granted

Constitutional policy considerations

[REDACTED]

Whilst the AHRC is a corporate Commonwealth entity (CCE), it is treated as a NCCE for the purposes of the Directions (by virtue of being an 'FMA agency' with the meaning of the definitions in Part 4 of the Directions). In any event, CCEs are separately obliged to advise when constitutional issues arise in litigation and comply with any instruction from you regarding the conduct of such litigation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Immigration policy considerations

[REDACTED]

Human rights policy considerations

The matter also raises important human rights issues, specifically relevant to indefinite detention and human liberty.

[REDACTED]

The department's recommendation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The draft letter to Professor Croucher advises that competing considerations are assessed on a case-by-case basis, and approval in this matter does not necessarily suggest that future requests will be approved.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Consultation: OCL, AGS, the Human Rights Branch, AGD, and the Department of Home Affairs have been consulted in relation to this matter.

Key Risks and Mitigation: The risks to the Commonwealth's various policy interests (constitutional, immigration and human rights) of either granting or declining the AHRC's request are set out in the submission.

AGD Clearing Officer: Kathryn Haigh, First Assistant Secretary, Legal Services and Royal Commissions Division, [REDACTED] Date Cleared: 2 June 2023 Branch Head: Michael Johnson, Office of Legal Services Coordination, [REDACTED] Dept Action Officer: [REDACTED], BRCH-IIG-LSRCD-Office of Legal Services Coordination, [REDACTED]
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Attachments:

- Attachment A - Draft response to the President of the AHRC
- Attachment B - Letter from the President of the AHRC to the Attorney-General, dated 22 May 2023
- Attachment C - Department of Home Affairs - Significant Issues Report - NZYQ
- Attachment D - AHRC - Tied Work Constitutional Work Exemption, dated 8 June 2010
- Attachment E - Further Details on Previous Tied Work Approvals
- Attachment F - AGS Advice, dated 24 May 2023



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

10/7330

- 8 JUN 2010

The Hon Catherine Branson QC
President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Dear President

I refer to my letter of 21 October 2009, in which I advised that I was considering your request for an exemption under Appendix A to the *Legal Services Directions 2005* for the Australian Human Rights Commission to undertake constitutional law work. We have also met since you received my letter, and I understand you have discussed the exemption request with senior officials in my Department.

I have decided to grant an exemption to the Commission to undertake tied constitutional law work, subject to the conditions set out in Attachment A to this letter.

Pursuant to this exemption, the Commission is not required to seek approval or clearance of constitutional submissions from the Australian Government Solicitor or the Constitutional Policy Unit of my Department, before making such submissions in certain forums.

If you have any questions about the exemption, please contact the Office of Legal Services Coordination within my Department.

Yours sincerely

Robert McClelland

Attachment A

Legal Services Directions 2005

Approval for a non-tied provider to undertake tied constitutional law work

Approval is given under paragraph 3B of Appendix A to the Legal Services Directions, for the Australian Human Rights Commission (the Commission) to undertake tied constitutional law work in forums other than the High Court of Australia.

This approval is subject to the following conditions:

- The Commission is to make clear in any written or oral submissions on constitutional law that those submissions are that of the Commission, rather than that of the Commonwealth Government.
- The Commission is to advise the Constitutional Policy Unit of the Department of all constitutional law submissions that it has made, and provide copies of those submissions as soon as practicable. If submissions are made orally, a detailed note is to be provided in lieu of a copy of written submissions.
- The Commission is to report to the Office of Legal Services Coordination on a quarterly basis from the date of this letter, of all matters in which it made constitutional submissions and the outcome in each of those matters in that period.
- This approval does not permit the Commission to depart from any of the obligations it otherwise has under the *Legal Services Directions 2005*.



Sub No: MS23-000656

Date submitted to Office by AGD: 5 June 2023

File No: 23/10404

Min No: N/A

ATTORNEY-GENERAL

Australian Human Rights Commission: request for tied work approval - *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*

Deadline: 9 June 2023 – the President of the Australian Human Rights Commission (AHRC) has requested a response by that date to allow the AHRC sufficient time to prepare and file written submissions (as an intervener) by the High Court's deadline of 23 June 2023.

Recommendation: I recommend that you:



Attorney-General

5/6/2023

AG Comments

Key Issues: On 22 May 2023, the President of the AHRC, Emeritus Professor Rosalind Croucher AM, wrote to request your approval for a tied work exemption under paragraph 3B, Appendix A of the *Legal Services Directions 2017* (the Directions) for the AHRC to use in-house lawyers and external counsel to undertake necessary constitutional work to allow the AHRC to intervene to make submissions and appear in the matter of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (NZYQ)* in the High Court (Attachment B).

The President of the AHRC has also indicated that she wishes to meet with you to discuss the existing tied work arrangements that the AHRC is subject to under the Directions (including whether any amendments are required to them). The department will engage with your Office separately about this.

Background information

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs

The Solicitor-General has been briefed to appear for the Commonwealth in this matter.

The plaintiff arrived in Australia in 2012 as an unauthorised maritime arrival. He is a stateless Rohingya Muslim from Rakhine State in Myanmar and asserts that Australia recognises that he is owed protection obligations. His application for a protection visa was refused by a delegate of the Minister on 30 July 2020 pursuant to section 36(1C)(b) of the *Migration Act 1958* (Migration Act). His application was refused on the basis that he had been convicted of a serious crime and was on reasonable grounds considered by the Minister to be a danger to the Australian community. The plaintiff remains in immigration detention – he cannot be released into the community due to the visa refusal and he cannot be removed from Australia as he is not a citizen of Myanmar, does not have any right to reside there and does not hold citizenship of any other country.

The plaintiff seeks to have the High Court overrule or distinguish its previous decision in *Al-Kateb v Godwin* (2004).

In *Al-Kateb*, the issue before the High Court was whether the Migration Act authorises the indefinite detention of unlawful non-citizens for the purposes of removal, in cases where there is no prospect of removal from Australia in the reasonably foreseeable future and, if so, whether relevant provisions of the Migration Act are constitutionally valid. The High Court held by a bare majority that the relevant provisions of the Migration Act authorised and required the detention of an unlawful non-citizen, even if removal from Australia was not reasonably practicable in the foreseeable future, and were consistent with Chapter III of the Constitution.

Further information is available in the Significant Issues Report (Attachment C).

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[REDACTED] Such an approval may be subject to certain conditions (such as a tied provider clearing draft submissions). The authority to approve a non-tied provider to undertake tied work is delegated down to specified EL2 officers within the department. However, past practice has seen 'standing' approvals and particularly sensitive requests considered by the Attorney-General personally.


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The AHRC seeks to intervene or appear as *amicus curiae* under paragraph 11(1)(o) of the *Australian Human Rights Commission Act 1986* (AHRC Act). Under paragraph 11(1)(o) of the AHRC Act, the AHRC has a statutory function to intervene in proceedings that involve human rights issues, such as immigration detention.

As a general rule, the AHRC will only intervene in a matter which raises significant human rights considerations. The AHRC considers that *NZYQ* satisfies its intervention guidelines as it deals with the right to liberty and freedom from arbitrary detention under Article 9 of the *International Covenant on Civil and Political Rights*.

AHRC's standing exemption under the Directions

The AHRC has a standing exemption under the Directions, granted in 2010 by then Attorney-General the Hon Robert McClelland MP, from the obligation in Appendix A for constitutional law work to only be undertaken by tied providers (Attachment D). The exemption allows the AHRC to use its in-house lawyers and engage external lawyers, subject to conditions, to undertake constitutional law work in forums other than the High Court.




The AHRC has a separate standing exemption under paragraph 5 of the Directions, allowing it to use in-house lawyers as solicitors on the record in court proceedings at all levels.

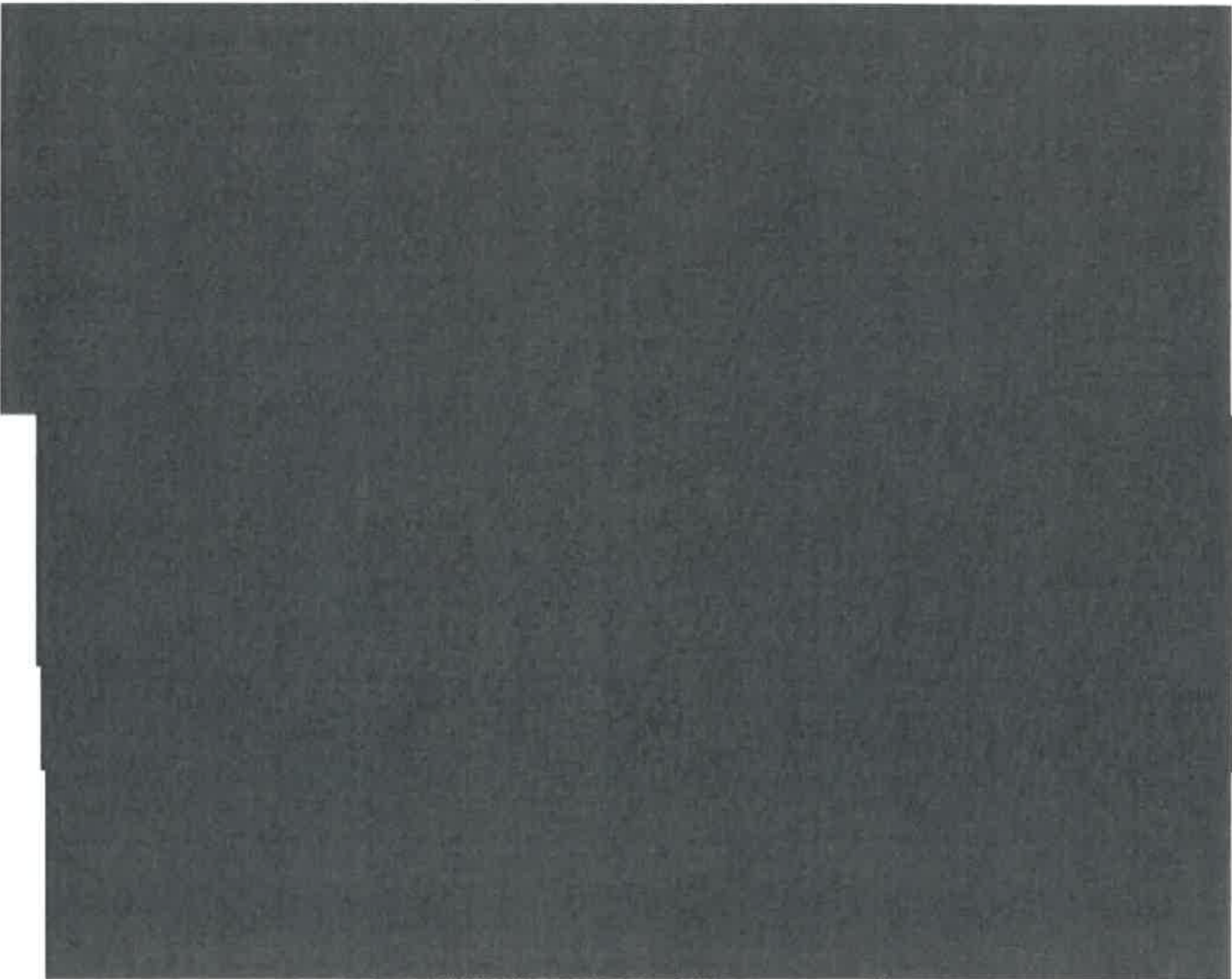
Further information about previous tied work requests for the AHRC to make constitutional arguments in the High Court is set out in Attachment E.

Considerations relevant to whether exemption should be granted

Constitutional policy considerations



Whilst the AHRC is a corporate Commonwealth entity (CCE), it is treated as a NCCE for the purposes of the Directions (by virtue of being an 'FMA agency' with the meaning of the definitions in Part 4 of the Directions). In any event, CCEs are separately obliged to advise when constitutional issues arise in litigation and comply with any instruction from you regarding the conduct of such litigation.



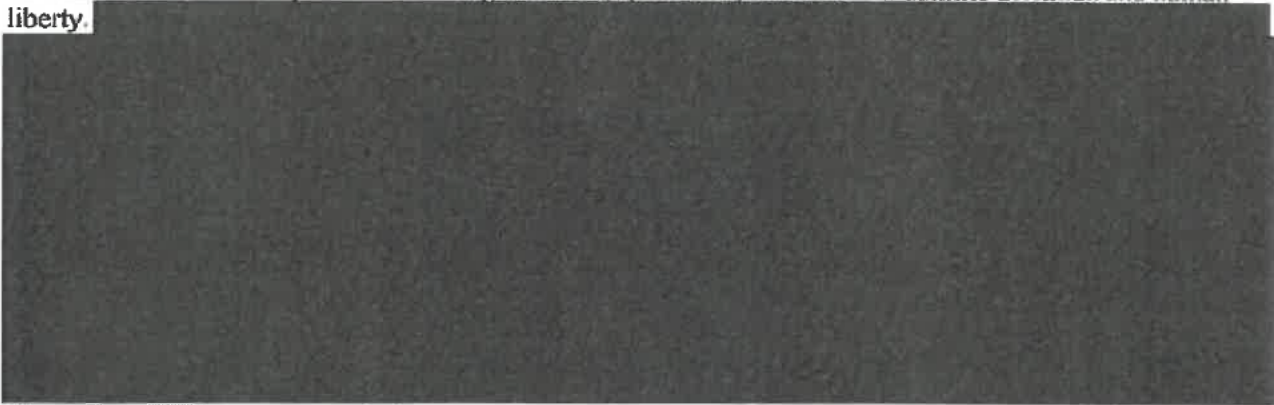


Immigration policy considerations

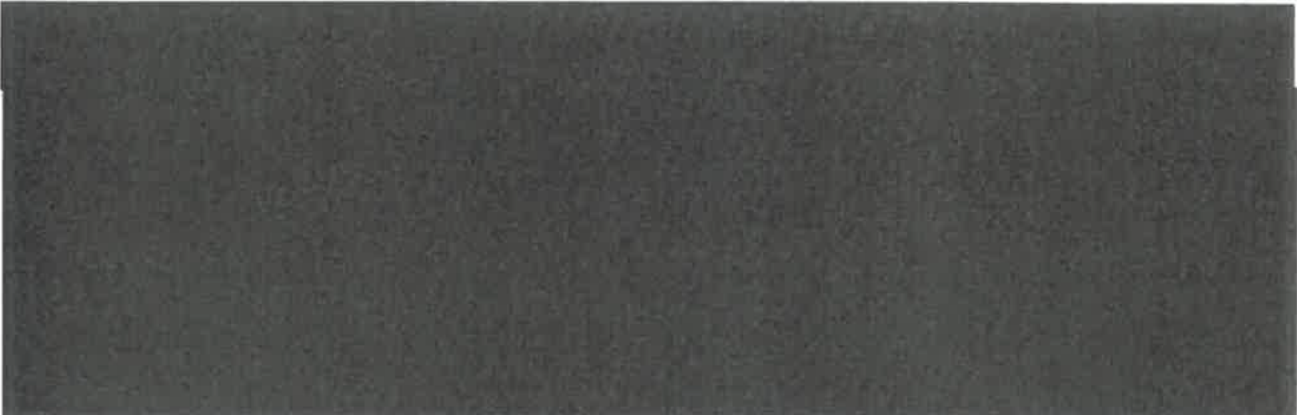


Human rights policy considerations

The matter also **raises important human rights** issues, specifically relevant to **indefinite detention** and **human liberty**.



The department's recommendation



[REDACTED]

[REDACTED] The draft letter to Professor Croucher advises that competing considerations are assessed on a case-by-case basis, and approval in this matter does not necessarily suggest that future requests will be approved.

[REDACTED]

Consultation: OCL, AGS, the Human Rights Branch, AGD, and the Department of Home Affairs have been consulted in relation to this matter.

Key Risks and Mitigation: The risks to the Commonwealth's various policy interests (constitutional, immigration and human rights) of either granting or declining the AHRC's request are set out in the submission.

AGD Clearing Officer: Kathryn Haigh, First Assistant Secretary, Legal Services and Royal Commissions Division, [REDACTED]

Date Cleared: 2 June 2023

Branch Head: Michael Johnson, Office of Legal Services Coordination, [REDACTED]

Dept Action Officer: [REDACTED] BRCH-IIG-LSRCD-Office of Legal Services Coordination [REDACTED]

Attachments:

- Attachment A - Draft response to the President of the AHRC
- Attachment B - Letter from the President of the AHRC to the Attorney-General, dated 22 May 2023
- Attachment C - Department of Home Affairs - Significant Issues Report - NZYQ
- Attachment D - AHRC - Tied Work Constitutional Work Exemption, dated 8 June 2010
- Attachment E - Further Details on Previous Tied Work Approvals
- Attachment F - AGS Advice, dated 24 May 2023

From: [Ministerial Correspondence](#)
To: [Croucher, Rosalind\(HumanRights\)](#)
Subject: Correspondence from the Attorney-General and Cabinet Secretary, The Hon Mark Dreyfus KC MP - MS23-000656 [SEC=OFFICIAL]
Date: Tuesday, 6 June 2023 12:08:37 PM
Attachments: [MS23-000656.pdf](#)
[Image001.png](#)

OFFICIAL

Dear Emeritus Professor Croucher,

Please find attached signed correspondence from the Attorney-General and Cabinet Secretary, the Hon Mark Dreyfus KC MP.

The correspondence is provided in Adobe Portable Document Format (PDF). If you do not have software capable of reading PDF documents, you may download a free version from <http://get.adobe.com/reader/>.

Please do not respond to this email as this mailbox is not monitored. If you wish to provide further correspondence, please use the following details:

Email

pag.gov.au

Postal Address

The Hon Mark Dreyfus KC MP
Attorney-General and Cabinet Secretary
Parliament House
CANBERRA ACT 2600

Kind regards

Ministerial Correspondence Unit

Attorney-General's Department

Machine generated alternative text: Australian Government | Attorney-General's Department | Strategy and Governance



OFFICIAL



Attorney-General

Reference: MS23-000656

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

By email: @humanrights.gov.au

Dear Emeritus Professor Croucher

Thank you for your letter of 22 May 2023 seeking my approval to use in-house lawyers and external counsel to perform tied constitutional law work in the matter of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (NYZQ matter) that is being heard in the High Court, in the event that the Australian Human Rights Commission (AHRC) receives leave to intervene or appear as *amicus curiae* in the proceeding.

I approve, under paragraph 3B of Appendix A to the *Legal Services Directions 2017* (Directions), the AHRC undertaking constitutional law work in the High Court in the NYZQ matter on the following condition:

- (a) the AHRC must make clear in any written or oral submissions that those submissions are submissions of the AHRC and not submissions on behalf of the Commonwealth.

For the purposes of this approval, the approved non-tied providers are:

- (a) the AHRC's in-house lawyers, and
- (b) external counsel engaged by the AHRC.

The AHRC's standing exemption under the Directions allows it, subject to conditions, to undertake constitutional law work in forums other than the High Court. The carve-out to the exemption for constitutional matters in the High Court acknowledges the increased sensitivity when constitutional matters are argued in the High Court, and allows the balancing of relevant considerations to occur on a case-by-case basis. Whilst I have concluded that the considerations in the NYZQ matter weigh in favour of granting approval, future requests will equally be assessed on a case-by-case basis.

I also note the invitation in your letter to discuss the application of the tied work regime under the *Legal Services Directions 2017* to the AHRC more generally. I would be pleased to meet you to consider these issues further.

Yours sincerely

THE HON MARK DREYFUS KC MP
5/6/2023