



**Australian
Human Rights
Commission**

17 March 2017

Ms Toni Matulick
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Matulick,

Senate Legal and Constitutional Affairs Legislation Committee, Estimates hearing

I write to you concerning evidence provided by officers from the Australian Human Rights Commission to the Senate Legal and Constitutional Affairs Legislation Committee during the Additional Estimates hearing on 28 February 2017.

Officers from the Commission who provided evidence to the Committee yesterday identified the following clarification.

Evidence of Mr Graeme Edgerton, Acting Deputy Director, Legal Section, Australian Human Rights Commission

On page 28 of the transcript, in responding to a question from Senator Macdonald, Mr Edgerton said that a complaint made by Ms Cynthia Prior to the Australian Human Rights Commission was a public document and was on the court file as part of court proceedings filed by her.

The Australian Human Rights Commission would like to clarify that evidence as follows.

A person who wants to start a proceeding in the Federal Court or Federal Circuit Court under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act)

must file an originating application in an approved form.¹ The originating application must be accompanied by a copy of the original complaint to the Commission.²

Ms Prior filed an originating application in the Federal Circuit Court on 20 October 2015. This originating application was accompanied by her original complaint to the Commission, dated 27 May 2014.

Usually, a person who is not a party may inspect an originating application in the Federal Court Registry.³ That is, originating applications are generally considered to be public documents.

However, in *Oldham v Capgemini Australia Pty Ltd* [2015] FCA 1149, Mortimer J held that the complaints made to the Commission that accompany originating applications are not documents that the public ordinarily has a right to inspect. Her Honour relevantly said at [23]:

It has been held that a complaint to the Commission does not form part of the originating application, and therefore leave is required to inspect such a document: see *Charles v Fuji Xerox Australia Pty Ltd* [2000] FCA 1531; 105 FCR 573. The terms of r 34.163 (that the originating application must be “accompanied by” the AHRC complaint) also make it clear, in my opinion, that the complaint is to be treated under the Rules as a document separate from the originating application itself.

Justice Mortimer noted that s 49 of the AHRC Act imposes significant non-disclosure obligations on the Commission and its staff. Her Honour concluded at [31]:

The Commission deals with complaints of unlawful discrimination under a number of federal statutes. Often, the subject matter of those complaints is intensely personal. Many complainants are not legally represented. They may, to use a colloquialism, “pour their hearts out” in a complaint to the Commission. However they express their complaints, they do so in the confidence of a private process, designed to facilitate resolution of complaints through confidential conciliation. Once a person elects to proceed to this court, she or he has a fresh choice about the subject matter of the claim made in this court, and how it is expressed. She or he cannot materially change or exceed the subject matter complained of before the Commission, but it can be narrowed and circumscribed. It can be couched in different language. In my opinion it would generally be inimical to the purpose and structure of the AHRC Act, which is based around confidentiality as between complainants, the Commission and respondents, for an AHRC complaint to be made available for public inspection in this court.

As a result, Mortimer J refused the application for leave to inspect the complaint made to the Commission that accompanied the originating application.

¹ *Federal Court Rules 2011* (Cth), r 34.163(1); *Federal Circuit Court Rules 2001* (Cth) r 41.02A(1).

² *Federal Court Rules 2011* (Cth), r 34.163(2)(a); and see the Human Rights Application Form approved by the Chief Judge of the Federal Circuit Court pursuant to r 2.04(1A) of the *Federal Circuit Court Rules 2001* (Cth).

³ *Federal Court Rules 2011* (Cth), r 2.32(2)(a); *Federal Circuit Court Rules 2001* (Cth) r 2.08(4).

Given the request by Senator Macdonald for a copy of the complaint filed by Ms Prior with the Commission, the Commission has written to Ms Prior and asked whether she has any objection to a copy of her complaint being provided to the Committee.

Yours faithfully,

Michelle Lindley
Director (A/g)
Legal Section

Cc: Andrew Walter, Assistant Secretary, Civil Law Unit.