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*USING THE HUMAN RIGHTS SYSTEM TO PROTECT AND*

*PRESERVE INDIGENOUS LANGUAGE USE*

*by*

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The presentation today is about the different ways of using the human rights system to protect and preserve indigenous language use. These include international, national and local or state and Territory, human rights mechanisms within Australia.

My experience in this area comes from being both a disabled person, and also a representative of the Deaf and Hearing Impaired for the last ten years for the Deafness Forum, the national peak body for deafness, on the National Working Party on Captioning in Sydney, and in my capacity as Vice President of the ACT Deafness Resource Centre. My current work in this area is as convenor of the Self Help for the Hard of Hearing/ Living with Hearing Loss Group in Canberra. I have also studied

International Human Rights Law with professor Hilary Charlesworth where I wrote on the Mandatory Sentencing Law and Indigenous language Use as the case studies for my thesis.

I have also personally submitted six Human Rights Complaints so far, four with HREOC, and two with the ACT Human Rights Office. Three of the Complaints with HREOC were against Sydney based hotel chains, and I won these Complaints. The one I lost was against Telstra, but it ended up being resolved separate to the HREOC process, and I won one and lost one in the ACT Human Rights Office. The main reason for my lost cases was that I chose the wrong area to submit my claim against. I said that I was discriminated against because of my Disability, when it was more a case of Sexual Harassment, and I couldn't prove that I had suffered a Detriment, even though I had suffered emotionally. This is exceptionally important for everyone wanting to submit a Complaint to know. You must select the appropriate area and grounds for the Complaint, and you must have suffered a Detriment such as psychological distress or physical illness, or have had something bad happen to you because of the Discrimination.

**NOW TO MOVE ONTO THE AREAS WHERE HUMAN RIGHTS COMPLAINTS CAN BE MADE.**

There are three different organisations where Complaints regarding human rights violations, including indigenous issues, can be made.

They are:

- 1) The United Nations Working Group on Indigenous Populations.
- 2) The Human Rights and Equal Opportunities Commission.
- 3) The State or, in this case, the Northern Territory Human Rights Office.

The first part of this paper deals with the United Nations system, and will be followed

by reviewing Australian mechanisms for handling Human rights discrimination cases. In the United Nations system representation can be made through the Australian Government representative on the Working Group on Indigenous Populations. (There is also a handout available with useful United Nations Human Rights web addresses from the World Conference on Racism held in South Africa in 2001.) This way of dealing with discrimination issues brings to the attention of the world human rights forum the fact that violations are occurring continuously in this country and allows the United Nations the option of putting pressure on the Australian Government to rectify the problems.

This was the case with the Mandatory Sentencing law which has been repealed with the installation of a Labour Government, but the problem now seems to be that harsher penalties are being dealt out to offenders and the problem of indigenous people being jailed more often than anyone else continues. In this situation where often the indigenous person speaks either a form of English that is Kriol based, or else they speak their own Traditional language and are not used to explaining their actions in a European style setting. The indigenous person is being discriminated against in the area of access, on the grounds of race under the Discrimination Act. The problem is that when this situation occurs, the matter is already before the court and it is then up to the lawyers to apply to the court for provision to be made for their client to have access to interpreting services.

In this area, under Article 14 of the International Covenant of Civil and Political Rights, it states that 'all persons shall be equal before the courts and tribunals'.

Therefore if an indigenous person cannot understand the court process because of a language barrier than they have the right to an interpreter and can say that their court process is unfair if they don't have one.

Legal advice that I received from professor Charlesworth who is Head of the Centre for International and Public Law, and who is also a barrister, said that in criminal cases the case would not be heard in these circumstances without an interpreter. If the person is indigenous and is not used to the legal language used in the court setting, it is important for them to have at least access to an Oral Interpreter to translate their Kriol, or Aboriginal English back to the language used in the court, or “Legalese”. In other circumstances where they don’t have access to an interpreter in formal or informal settings, they can put in a Complaint to the Racial Discrimination Commissioner at HREOC to appeal against the process.

Australia has agreed as a member state of the United Nations, to the International Covenant on Civil and Political Rights, and has enacted legislation incorporating this human rights instrument into national and state law. It can therefore be used in the Australian legal system as a means of arguing a case of discrimination.

The *Mabo* case was the most significant case within Australia in recent history, in the area of indigenous human rights worldwide. It ‘paved the way’ for the argument of self-determination and Land Rights to be recognised by international law, and created a means of pursuing more successfully indigenous human rights today.

Other human rights instruments exist that relate specifically to indigenous peoples. They are the International Labour Organisation Convention (ILO) No 107, Indigenous and Tribal Populations Convention of 1957, and International Labour Organisation Convention No 169, Indigenous and Tribal Peoples Convention of 1989. Australia did not ratify these Conventions and they therefore were not enacted in federal legislation. However, they were the first human rights instruments to relate specifically to indigenous peoples and, though they started out as a post-colonial attempt to recognise indigenous people as nations in their own right. It was only in

recent times with the advent of the Draft Declaration on the Rights of Indigenous Peoples that has been constructed by representatives of indigenous peoples themselves, together with government representatives, that a human rights instrument that is directly relevant to protecting indigenous culture has been formulated.

Unfortunately, as stated by human rights expert Anaya, it is going to possibly take up to another 10 years for it to be a fully operational human rights instrument that can be recognised in international law. It can however be referred to in customary international law in the court process.

An example of human rights protection occurring under the UN Draft Declaration on the Rights of Indigenous Peoples, which was passed at the 36<sup>th</sup> meeting of the United Nations on the 26<sup>th</sup> August 1994 is as follows: -

ANNEX (part thereof)

*Reaffirming* also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind.

*Concerned* that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

*Recognising* in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well being of their children.

## ARTICLE 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

## ARTICLE 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the state.

## ARTICLE 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

## ARTICLE 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

## ARTICLE 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

It can be seen from these articles that indigenous peoples worldwide have identified their need to protect indigenous languages and culture, in all settings, including legally, and have formulated international law to protect these issues. Included in 'oral traditions' is the question of teaching and using indigenous language. While there appear to be a number of bilingual education programs in schools located within indigenous communities, it is important that this education process be taken a step further. Organisations such as the government interpreter service should be involved in testing and providing indigenous language interpreters in places such as courts and government organisations.

THAT CONCLUDES THE FIRST PART OF MY PAPER.

The second part of my paper, where I have had most of my practical experience, is the use of existing Human Rights systems to resolve personal Complaints of Discrimination within your work or daily life. These are done either through HREOC, the Human Rights and Equal Opportunities Commission, if the Complaint is against a national organisation, or through the Northern Territory Human Rights Office for a 'local' Complaint.

I have had email correspondence with HREOC, about whether or not indigenous people can submit a Complaint in Traditional Language or Kriol, and their answer is

that yes they can, but once the Complaint goes to the Supreme Court it is out of their jurisdiction, and as stated previously in legal advice from Professor Hilary Charlesworth, the law varies from state to state on this issue, but she said that in a Criminal matter the indigenous person undergoing the process should be allowed to use their own language, not just Kriol, and the Interpreter service needs to be updated either to include indigenous languages, or to have trained Oral Interpreters to translate European English to Aboriginal English.

Because of the possible problems associated with taking a matter to court, or to a Tribunal, it is very important to be able to settle a Complaint that has been found by the Human Rights Commissioner to be Discrimination through Conciliation rather than to take it to a Hearing.

It is also important to have a support person with you, an advocate, who knows something about the law, or to get some legal advice first before submitting your Complaint if possible, so that you know that you have answered all of the questions in the Complaint form correctly.

Your advocate should be someone who knows you reasonably well as they can then support you during the Conciliation Process, which can be quite stressful. Filling out the form as fully as possible is also very important as the Commissioner uses your statement as a basis for deciding whether or not you have been discriminated against using the information that you give them.

The Complaints that I have won were ones where I used a Disability Discrimination lawyer for advice first to see if I had grounds for a Complaint, and had an advocate as a support person before and during Conciliation meetings. I went into the meetings with an attitude that I wanted to settle through this process, and that I would stay in Conciliation until that had happened, as I generally didn't have the stamina, either

psychologically or physically, to take the matter to any kind of court. This way of doing things has worked for me.

The case I lost that I said was Discrimination on the grounds of Disability instead of Sexual Harassment at least brought the matter to the attention of the person who I complained about to his employer. I consider that to be some satisfaction, but not a win, and did not resolve the problem.

It is also very important to have some evidence to substantiate your Complaint. This can be hand written diary entries, witness statements, doctors certificates, or copies of emails or letters that you may have written in your attempt to resolve the problem.

As well as this, it is important to have firstly attempted to talk the problem through with an Investigations Officer from HREOC, or a Conciliation Officer from the Human Rights Office, before submitting the Complaint. These people can help you to clarify your position, and assist you in wording your Complaint effectively.

In relation to Indigenous Language Issues, it is very important not only to have bilingual education programs, but also to train and use Indigenous interpreters both within daily life and within formal settings, such as in the courts.

In her book “Aboriginal English and the Law”, (1992), Diana Eades says: -

“Most of the Aboriginal English speakers who come before the courts have had marginal and /or largely unsuccessful participation in mainstream Australian education and employment. Hence they have had little chance to develop this bicultural competence.”

She also states that: -

“It is clear that Aboriginal people are seriously disadvantaged in those formal situations where success in an interview is crucial to an individuals rights and

benefits”.

From my research so far I have discovered the injustices within the legal system and realise that the way forward is not only by being represented by ATSIC in obtaining recognition for indigenous human rights, but by also taking an active role in your own discrimination issues. This can be done by submitting individual Complaints to either HREOC or the Northern Territory Human Rights Office, and by representation on a global scale at the United Nations through representation on the UN Working Group on Indigenous Populations.

The key point to remember when submitting a Complaint is to state as often as necessary, and as clearly as possible, that you have suffered a Detriment as a result of the discrimination that you are complaining about. And have evidence either in your own diary entries or notes, or in witness statements or records of attempting to resolve the problem by other means such as meetings, letters or emails

When dealing with legal matters before the court, remember to ask for an interpreter if you know that that is your best way of understanding what is happening in relation to the language being used. During police interviews there is the protection of the “Anunga Rules” where police are obliged to interview indigenous according to these guidelines and if they haven’t done so, their evidence can be ruled as inadmissible. It is also a good idea to make sure that your lawyer is familiar with indigenous customs and culture, though I realise that in an arrest type situation this would be difficult to think about. Making sure the Northern territory legal Aid Office has a copy of the book “Aboriginal English and the Law” is a good way of ensuring that the legal people most likely to represent indigenous people have people who understand something about their culture is a good start.

Always remember that you as an individual can make a difference, not only to your

own lives, but also to the lives of others, if you follow through with a human rights Complaint when your rights have been violated. You can change policy in large organisations and bring some recognition to your own Traditional values when you incorporate those changes that you want to happen in the Conciliation Process, and have those policy changes written into your final settlement agreement. So, while I know that these are not easy paths to follow, they are important pathways to changing your world for the better, so good luck and thank you for listening.

## **KEY POINTS**

**3 Possible areas to make Complaints to: -**

**United Nations Working Group on Indigenous Populations**

**Human Rights and Equal Opportunities Commission**

**Northern Territory Human Rights Office**

**UNITED NATIONS HUMAN RIGHTS INSTRUMENTS INCLUDES: -**

ICCPR International Covenant on Civil and Political Rights

CERD Covenant on the Elimination of Racial Discrimination

CRC Covenant on the Rights of the Child

CEDAW Covenant on the Elimination of Discrimination Against Women

UN PROTECTION ALSO INCLUDES THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, and **UN Working Group on Indigenous Populations.**

**HUMAN RIGHTS PROTECTION WITHIN AUSTRALIA INCLUDES: -**

(under Federal law and incorporating UN Treaties)

the Human Rights and Equal Opportunity Commission, Sydney.

For Conciliation. Inquiries go to the Federal Court.

Best with legal advice first and assistance of an Advocate.

Human Rights protection within States and Territories.

State or Territory Human Rights Office.

Best when able to settle through Conciliation

Must have suffered a Detriment

Can then go to the Tribunal (also best with legal advice and assistance of an Advocate prior to Conciliation process, Conciliation Officer can help here).

### **EXAMPLES OF SUCCESSFUL OUTCOMES**

HREOC- lack of captioning facilities in hotels that I had stayed in.

Settled through Conciliation

OUTCOME- all 3 hotel chains now have teletext TV's with caption facilities, and will replace existing TV's with captioning facilities as required throughout Australia.

ACT Human Rights Office- access issue.

OUTCOME- settled through Conciliation with legal proviso that I am not allowed to discuss the Complaint. Can say that it was discrimination in the area of education on the grounds of disability. And I did have written evidence, and I did win.

### **EXAMPLES OF UNSUCCESSFUL OUTCOMES**

HREOC- Complaint against Telstra.

Decision that I wasn't discriminated against because of my Disability, but had been treated badly by Telstra. Resulting in resolution of Complaint directly with Telstra at a later date.

ACT Human Rights Office- Complaint against male cleaner sent to clean my house by agency. Decision that I was not discriminated against because of Disability. In

hindsight this should have been a Complaint on the Grounds of Sexual Harassment.

### **IMPORTANT TO NOTE**

**In all Complaints I had suffered both physically and psychologically, and had emails and diary entries to support my Complaints.**

**So I had evidence that the problem had occurred, and evidence that I had suffered a Detriment because of the Discrimination that I believed had occurred.**

**I also had free legal advice to discuss the Discrimination problem and decide whether or not there was a possibility of success, with a Disability**

**Discrimination lawyer, and I had the support of an advocate during the Conciliation Processes.**

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