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Our Ref: GOV180045
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Dear Darren

Discussion paper – An office for advocacy and accountability in Aboriginal affairs in Western Australia

Thank you for your letter of 2 July 2018 and for the opportunity to make a submission on the proposal to establish an independent statutory office relating to Aboriginal Western Australians.

I support the proposal and am confident that it will make a significant difference in advancing the interests of Aboriginal people in this State.

I have the following response to the three questions.

What are your views about this outline of the office's basic features? Does it miss anything important? Is anything included that shouldn't be?

I agree that the business of the office should not be limited to State Government issues. I agree it should be free to speak about Commonwealth and local government issues and how the three levels could work together to achieve positive outcomes for Aboriginal people.

In addition, I consider that the office should be free to speak about the private sector, community behaviour and attitudes and advocate for change beyond the government sector. At the federal level, the Aboriginal and Torres Strait Islander Social Justice Commissioner is not constrained to advocacy in the government sector, nor are the other federal commissioners. The absence of such constraint significantly increases their effectiveness. Having said that, holding State Government agencies to account should be one of the prime and specific roles of the office.

At the federal level there has been an unfortunate practice of leaving commissioner positions vacant for an extended period, often with another commissioner becoming an acting commissioner for the vacant position. Leaving the position vacant could allow the effectiveness to be reduced if a government was so inclined. I recommend that the legislation place a limit on the period for which the position does not have a substantive occupant.

The discussion paper states it is not envisaged that the office would have a role in advocating for individual cases. I suggest that the office should not be required to advocate in individual cases, however the office should be free to do so. Progress in human rights has often occurred and been dependent on publicising and advocating for an individual case. That is true throughout the world, for example the cases of Rosa Parks and Ruby Bridges in the USA. In WA the cases of John Pat in 1983 and Ms Dhu in 2014 are relevant. The office should also be able to advocate in individual cases when advocating for change to government policies, even if the case is not already known to the public. An example would be eviction or refusal to provide publicly-funded housing to an Aboriginal woman due to an outstanding debt that arose from inability to pay for damage to a property rented to her where the damage was caused by an estranged partner in a domestic violence incident.

The discussion paper talks of an office independent of government but does not clarify exactly what this means. It may be taken by some readers to mean that the person appointed to the office will be the Chief Executive Officer (CEO) of an independent agency. However, the essential feature of independence is that the holder of the office is independent in performing the statutory functions assigned to the office under the legislation that creates the office. That does not require a separate independent agency.

In WA some holders of independent statutory offices are also CEOs of a small agency of fewer than 20 people. This can be problematic, since an agency of 20 people must comply with the same financial, human resource, procurement and other administrative requirements as an agency of 20,000 people. These compliance requirements can use a disproportionate amount of the resources of the agency and be a major distraction for the office holder, who should be focused on the statutory functions in the enabling legislation and not spend a disproportionate amount of time attending to government administration requirements.

An alternative model that allows statutory independence without a disproportionate administrative burden is performance of the administrative functions through the mechanism of 'Administered Transactions' with a larger agency. Another mechanism is to adopt the model used by the Australian Human Rights Commission (AHRC) and by the Australian Capital Territory Human Rights Commission. In both cases a number of commissioners are part of an agency that performs the administrative functions and leaves the commissioners free to perform their statutory functions. The Aboriginal and Torres Strait Islander Social Justice Commissioner is one of the commissioners who form the AHRC. The Human Rights Commission model may facilitate sharing of resources such as offices and reception, media officers and project officers and facilitate achievement of synergies with commissioners who have overlapping or related functions. It may also enhance career opportunities of employees.

The 'Administered Transactions' and AHRC models also have the advantage that selection of a commissioner can focus on the statutory functions the office is to perform, and not give undue weight to experience relevant to managing an independent government agency.

What should be the formal name of the office?

The word 'Commissioner' appears to have a meaning well understood by the community as an independent person and there are precedents for its use throughout Australia. A possible disadvantage is that it was used previously in the title of the Commissioner for Native Affairs (1936 -1963) and may still have negative connotations for Aboriginal people. However, other things being equal, I suggest the title include the word Commissioner.

Although a key role of the office will be to hold the Government and its agencies accountable, I have suggested above that the role should be much broader and include wider advocacy in the WA community. I suggest that inclusion of the word 'accountability' in the title may be unduly restrictive of the role the office should have.

The key role is really advocacy, whether advocacy for accountability by government agencies or advocacy for change to community attitudes and behaviours, and advocacy for identification and removal of systemic discrimination.

I suggest the title could be Aboriginal Advocacy Commissioner or perhaps Aboriginal Human Rights Commissioner or Aboriginal Social Justice Commissioner.

In this matter I consider the views of the Aboriginal community are far more important than my view and I defer to their view if different to mine.

How should Aboriginal people and organisations and individuals be involved in the appointment process of the office-holder? Who should be involved?

Again, I defer to whatever views Aboriginal people express on this matter.

I note that the discussion paper states that the holder of the office should be an Aboriginal person. I agree with this and suggest that this requirement is specified in the legislation that creates the office.

One possibility is to appoint a search panel of prominent and widely-respected Aboriginal people, not necessarily confined to those born or resident in WA, that consults widely with the Aboriginal community and organisations, and based on these consultations nominates for appointment to the office two or three WA Aboriginal people, including at least one female and at least one male nominee, with one nominee appointed to the office by the Governor. The consultation could include calling for applications and nominations through the media, including Aboriginal newspapers and websites.

Additional Comments

Substantive Equality

On page 1 of the discussion paper there are dot points that would be functions of the office. An additional dot point could be added relating to substantive equality.

In 2006 under the Premiership of Geoff Gallop, the government sought to redress the issue of cumulative disadvantage through the introduction of the Policy Framework for Substantive Equality (the Framework). The Framework attempted to require government agencies to consider whether there was systemic discrimination, in particular institutional racism, in the delivery of their services, and then to remove those barriers to put in place more equitable delivery of services.

The Framework remains in place as Public Sector Commissioner's Circular 2015-01 Implementation of the Policy Framework for Substantive Equality. However, the small unit that existed in the Equal Opportunity Commission to guide the process was defunded and disbanded in 2014 and the mandated agencies were not provided any specific funding to ensure the objectives of the program were met. As a consequence, the objective of the program has not been achieved.

Although substantive equality now extends beyond addressing Aboriginal disadvantage, that is still a major objective. Issuing a revised Public Sector Commissioner's Circular that provides a role for the new office in substantive equality and empowers the office in regard to monitoring and requiring compliance may be a useful mechanism to further the objectives of the new office.

Hearing Impairment

On pages 4 and 5 of the discussion paper factors are listed that work to reduce the influence of Aboriginal people and statistics are given that illustrate Aboriginal disadvantage.

There is one addition factor not mentioned that has a profound influence. Aboriginal people have disproportionately high incidence of hearing impairment. Hearing impairment is not simply a health issue. It affects the ability of people to communicate. People with a hearing impairment tend to have poorer outcomes with education, employment and interaction with the justice system and political process.

A recent Australian Law Reform Commission Report 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (ALRC Report 133) March 2018 stated at paragraph 2.41:

"Hearing impairment among adult Aboriginal and Torres Strait Islander prisoners is estimated to be extremely high—affecting between 80-95% of Aboriginal and Torres Strait Islander prisoners. This can result in communication difficulties when engaged with the criminal justice system, particularly where English is a second or third language. Hearing loss can also compound other forms of disadvantage regularly experienced by Aboriginal and Torres Strait Islander people, including unemployment and poor school performance, thus making entry into the criminal justice system more likely."

The Australian Government recently published its response to a report on the Parliamentary inquiry into the Hearing Health and Wellbeing of Australia. One of the recommendations relates to developing a national strategy to improve hearing health in Aboriginal and Torres Strait Islander communities. This recommendation was supported by the Government.

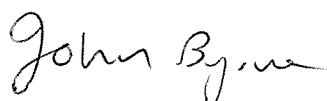
I encourage state and federal governments to include hearing impairment as one of the factors they routinely report when analysing and addressing progress in regard to Aboriginal people.

Concluding Comments

Thank you again for the opportunity to provide input to this important initiative, which I fully support. I would be pleased to be contacted for further inputs or explanation of the points I have made, and am available to meet with your officers if discussion is wanted.

I do not request any confidentiality for this letter or its contents.

Yours sincerely



John Byrne
Acting Commissioner for Equal Opportunity

30 AUG 2018