



**Australian
Human Rights
Commission**

6 December 2013

Ms Carly Nyst
Head of International Advocacy
Privacy International

By email: carly@privacy.org

Dear Ms Nyst

Your correspondence to the Australian Human Rights Commission (the Commission) in relation to the Australian Signals Directorate (also known as the Defence Signals Directorate) (DSD)

I refer to your correspondence to the Commission dated 2 December 2013 in relation to DSD. You allege a breach of human rights under the *International Covenant on Civil and Political Rights* (ICCPR) which is scheduled to the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA). You also alleged that DSD has breached the *Racial Discrimination Act 1975* (Cth) (RDA).

I note that you have requested that the Commission refer your allegations to the Inspector-General of Intelligence and Security (IGIS).

Consideration of the issues in your correspondence

Breach of human rights

Sections 11(3) and 11(4) of the AHRCA state that the functions of the Commission do not include inquiring into an act or practice of an intelligence agency, including DSD, and that the Commission shall refer such complaints to IGIS.

Having noted the above, in order for the Commission to accept a complaint from you and perform its referral function, the requirements of section 20(1)(b) of the AHRCA need to be met. Section 20(1)(b) requires that a complaint be made in writing, by or on behalf of one or more persons aggrieved by an act or practice, alleging that the act or practice is inconsistent with or contrary to any human right.

You have provided written correspondence to the Commission and you allege that DSD has engaged in an act or practice which is inconsistent with or contrary to Article 17 of the ICCPR. However, at this time it is unclear whether you are an 'aggrieved person' for the purposes of section 20(1)(b) and/or whether you are bringing the matter forward on behalf of others who are said to be aggrieved.

Racial Discrimination

You claim that DSD has applied a different threshold and set of safeguards for the rights of Australian persons compared to non-Australian persons and allege that this amounts to a distinction based on 'nationality' and a breach of the RDA.

Section 9(1) of the RDA provides that:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on **race, colour, descent or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

I note that the term 'nationality' is not found in section 9(1) of the RDA and that the term 'national origin' has been interpreted by courts as distinct from nationality. In *Australian Medical Council v Wilson* (1996) 68 FCR 46, Sackville J held that 'national origin does not simply mean citizenship'. Also, in *Macabenta v Minister of State for Immigration & Multicultural Affairs* (1998) 68 FCR 46, the Full Federal Court rejected the submission that 'national origin' could be equated with 'nationality' for the purposes of section 9 of the RDA. This view would also appear to be supported by Article 1(2) of the *International Convention on the Elimination of all forms of racial discrimination* (ICERD), which specifically provides that ICERD does not apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens.

Based on the above, at this time it is unclear how you are claiming that the DSD has allegedly breached the RDA.

Possible next steps

If after reviewing this information you wish to pursue a complaint with the Commission to then have it referred to IGIS, please provide further information in support of your claims within fourteen (14) days of the date of this letter.

Contact at the Commission

If you have any questions about this letter, you can contact me on (02) 9284 9756 or at adam.dunkel@humanrights.gov.au.

Yours sincerely


Adam Dunkel
Principal Investigator/Conciliator