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Submission to Senate Legal and Constitutional Committee Regarding the Australian Human Rights Commission Legislation Bill 2003

Introduction

The proposed legislation contains two changes of major concern: the removal of the specialist commissioner positions, and the imposition of a barrier to the exercise of the Human Rights and Equal Opportunity Commission's (the Commission) intervention role in the courts. This submission argues that these changes should be rejected.

There are also three other provisions that are of concern. These are the removal of the power of commissioners to recommend compensation, the appointment of part time complaints commissioners, and the legislative emphasis on education and individual responsibility.

The Removal of the Specialist Commissioner Positions

Amendments to Section 8 of the Human Rights and Equal Opportunity Commission Act 1986

The Bill recommends abolishing the present five specialist commissioners, and substituting them for three generic human rights commissioners.

The Cost of Human Rights

The Attorney General claims that the proposed reform is necessary to "take into account the possibility of new areas of commission responsibility (such as age discrimination)"¹. It is not clear whether the Government's concern is with the cost of the specialist commissioners, or whether it seeks to reduce the scope of the work which they carry out, and why. The amount of money saved by this measure would be insignificant compared to the impact on reducing the effectiveness of human rights protection for the groups involved. As the groups which are the concern of the specialist commissioners are diverse, and very different from each other, there would be little economy of scale by combining the specialist functions – instead, inevitably, less will be done by a part time generic commissioner than a full time specialist commissioner with deeper expertise and networks in the area of specialty.

The Government may be concerned with the financial burden associated with facilitating legislation for new grounds of discrimination, such as age, where a new commissioner might be required to manage and ensure the success of the new provisions. However this would not justify removing the current specialist commissioners, and a different mechanism for overseeing successful implementation of the necessary educational, research and policy functions could be introduced with that legislation.

¹ The Honourable Daryl Williams AM QC MP, Attorney General, Second Reading of the Australian Human Rights Commission Legislation Bill 2003, available @ <http://search.aph.gov.au/search/ParlInf...Second+reading+speeches&action=view&WCU>

If the commitment to human rights protection for the groups affected is genuine, the cost of the specialist commissioners is clearly justified. Each of the specialist commissioner positions has a record of having produced advocacy, educational and policy initiatives and research of great importance to the disadvantaged groups involved. Without their efforts, or with substantially reduced efforts, implementation of human rights legislation in Australia would be clearly tokenistic.

Issues of Concern

First, the specialised positions are well established within the relevant public constituencies, and to remove them may create some degree of bewilderment and antipathy within those constituencies should they feel disconnected from the process. Furthermore, the jurisdiction of the specialised office holders is recognised easily by members of the public, and should the specialist functions be taken away, the educative function of the titles would be lost with the focus of the roles.

Second, removing specialist commissioner roles is likely to result in a lack of personal understanding and experience on behalf of the generic commissioners of the disadvantages imposed on their constituencies, as they attempt to deal with multiple, often disparate, groups.²

Third, the three generic Commissioners would be unable to devote the appropriate amount of time, resources and expertise to each of the portfolios allocated to them, as the specialist commissioners have given³. Given the budget cuts experienced by the Commission in the last five to six years, and the resulting lack of resources allocated to each proposed generic human Rights Commissioner, their performance may be seriously inhibited no matter what degree of expertise they possess. Should added responsibilities be given to them, this problem will become much more acute⁴.

Fourth, the amendments would not require a Commissioner who is expressly responsible for Indigenous issues nor retain the present requirement in s.46B(2) of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* that the Aboriginal and Torres Strait Islander Social Justice Commissioner have considerable experience in the community life of Aboriginal persons or Torres Strait Islanders. Indigenous issues have become more urgent and serious over the last decade, and the proposed amendments may exacerbate problems. It is extremely important that an indigenous person hold the office of Aboriginal and Torres Strait Islander Social Justice Commissioner. By contrast, the Race Discrimination Commissioner has an area wider than indigenous issues and may need very different experience and expertise.

² Senate Legal and Constitutional Committee, *Report on the Human rights Legislation Amendment Bill (No.2) 1998* [3.7] available @ http://www.aph.gov.au/Senate/committee/legcon_ctte/human2/report/contents.htm

³ Email by Dr William Jonas AM, Acting Race Discrimination Commissioner, 9 April 2003; Senate Legal and Constitutional Committee, *Report on the Human rights Legislation Amendment Bill (No.2) 1998* [3.8].

⁴ Bills Digest No. 146 1998-99: *Human Rights Legislation Amendment Bill (No.2) 1999*, available @ <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd146.htm>

Restrictions Regarding the Commission's Intervention in Court Proceedings

Amendments to Sections 11 and 31 of the Human Rights and Equal Opportunity Commission Act 1986; Section 67 of the Disability Discrimination Act 1992; Section 20 of the Racial Discrimination Act 1975; and Section 48 of the Sex Discrimination Act 1984

The Bill seeks to restrict the Commission's ability to intervene in court proceedings, such that the Commission would only be able to exercise its intervention function if the Attorney General approves such action. The only proposed exception would be where the President of the Commission is a current or former Justice of the High Court, or a Judge of a federal court.

The history of human rights, and in particular of civil and political rights, is that they have been asserted first of all against governments. As private power has increased, there is now a move to assert them against private sector organisations. The protection of individual rights against government encroachment is, however, of fundamental importance, especially in the absence of any direct enforceable legal protection of rights, whether by a constitutional bill of rights or legislation. To give the Attorney-General veto power over the Commission's intervention function would be to seriously undermine what limited protection exists in Australia at present for human rights.

The provision is not saved by the concession that where the President of the Commission is a judge, only notice need be given and not permission sought. Whether or not such a President is appointed is entirely within the control of the government, and there is no justification for such a difference in procedure and power. Judges are very unlikely to come from the groups whose human rights are most under threat in Australia, and may be less aware of the problems they face.

Prior Use of the Intervention Function

According to the Attorney General the Honourable Daryl Williams, the rationale behind the proposed amendment preventing the Commission from intervening in court proceedings without his explicit permission, is not to "prevent court submissions that are contrary to the government's views, but rather to prevent duplication and the waste of resources and to ensure that court submissions accord with the interests of the community as a whole"⁵.

With respect to "preventing duplication", it can just as easily be argued that requiring the Attorney General's consent involves duplicating a function which the court must perform in any event, and is thus a misallocation of resources.⁶ The intervention function is already subject to the court's permission and any conditions imposed by it. Courts are alert to the risk of increasing costs for parties by allowing unnecessary interventions which add no fresh perspectives, and are unlikely to permit them.

As for "wasting resources" the record shows that the Commission has used the intervention function very sparingly, intervening only thirty five times in seventeen

⁵ The Honourable Daryl Williams AM QC MP, Attorney General, Second Reading of the Australian Human Rights Commission Legislation Bill 2003

⁶ Bills Digest No. 146 1998-99: *Human Rights Legislation Amendment Bill (No.2) 1999*

years in cases where an important human rights or anti-discrimination issue was raised, and where a party would either be unable to address it effectively, or not at all.

It is also pertinent that in eighteen of the matters that the Commission has affected intervention the Government has been one of the parties - in sixteen of those the Government has made submissions in opposition to the Commission (for example the Tampa litigation). Despite his disclaimer, giving the Attorney-General the power to veto intervention opens the possibility, and even likelihood, of its use to prevent "submissions that are contrary to the government's views". There is nothing in the Bill that would prevent the power being used in such a way. The vital importance of ensuring that the Commission can do what is necessary to ensure human rights issues are protected to the maximum degree possible has already been noted.

So far as ensuring that intervention "served the community as a whole", each time that the Commission has intervened, the court involved has expressed its gratitude, and indeed the Commission has never been refused such intervention. In any event the Commission is required to use publicly available guidelines when making a decision on intervention in human rights cases. Such guidelines may both aid in the arrival of a prudent decision by the Commission, and act as an accountability mechanism of sorts.

Issues of Concern

First, the Commission is the independent body responsible for scrutinizing and promoting human rights in Australia. Should its function of intervening in important human rights cases be crippled, the Commission would find its role as human rights watchdog greatly diminished. This same provision was recommended for removal from the *Human Rights Legislation Amendment Bill (No. 2) 1998* by the Senate Legal and Constitutional Committee for precisely this reason.

Second, the amendment will in all probability give rise to a conflict of interest considering that the Government is often the respondent in cases where the Commission chooses to intervene. The Attorney General is a member of the executive government, and it would be improper for a party to be in a position to exercise the power of decision as to who should be allowed to intervene in a case where it is itself a litigant. The proposed subsections concerning the Attorney-General's discretion explicitly leave open the range of considerations which can be taken into account. Since the Bill does not prevent it, it must be expected that the power would be exercised for political reasons, not in the interests of improving protection of human rights..⁷

Third, it is inappropriate for an Attorney General to retain sole responsibility for ascertaining the interests of the community in human rights cases in the absence of accountability mechanisms or avenue for review of some sort⁸.

Fourth, the 'gatekeeper' function should remain with the courts involved, not the Attorney General. Particularly when an important human rights issue is at stake,

⁷ Senate Legal and Constitutional Committee, *Report on the Human rights Legislation Amendment Bill (No.2) 1998* [2.9].

⁸ Senate Legal and Constitutional Committee, *Report on the Human rights Legislation Amendment Bill (No.2) 1998* [2.10].

before granting standing courts will consider in earnest what an intervening party will add to proceedings, thus creating a system of checks and balances⁹.

Fifth, the mere existence of such a power will expose the Commission to speculation that it is under the political control of the Government, particularly where human rights issues are involved. This would compromise its independence, both perceived and actual.

Sixth, the proposed creation of different systems of authorisation to intervene depending on whether the President is a current or former High Court or Federal Court Judge compromises the independence of the Commission, by suggesting that a President who does not have such a background is somehow less trustworthy or qualified to make such a decision than a judge. Under a non-judicial President, the Commission would be dependent on the Attorney General to perform one of its key functions in advocating and protecting human rights.

Seventh, it seems contradictory to strengthen the emphasis on the Commission's role as 'human rights educator' while at the same time restricting its intervention role. This role increases the Commission's ability to inform Australian human rights law, through judicial education in the course of litigation. The judicial branch of government should not be overlooked as one important forum for human rights education. Accordingly seems divergent from the proposed legislative focus on education that the Bill provides restrictions on the Commission before it can seek leave of the court for intervention in human rights cases¹⁰.

Eighth, the Principles Relating to the Status of National Institutions (the 'Paris Principles') may be contradicted by the proposed amendment. The Principles clearly say that national human rights institutions must 'freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its member or of any petitioner'¹¹. Subjecting the decision whether or not to intervene to the Attorney-General's oversight is a clear limitation on the Commission's independence from government.

⁹ Senate Legal and Constitutional Committee, *Report on the Human rights Legislation Amendment Bill (No.2) 1998* [2.17].

¹⁰ Bills Digest No. 146 1998-99: *Human Rights Legislation Amendment Bill (No.2) 1999*.

¹¹ National institutions for the promotion and protection of human rights ('Paris Principles'), GA/RES/48/134, 85th plenary meeting, 20 December 1993, 'Annex; Competence and Responsibilities; Methods of Operation', available @ http://www.asiapacificforum.net/about/paris_principles/Paris_Principles.doc

Removal of the Power to Recommend Compensation

Amendments to Section 29(2)(c)

The Bill proposes to remove the Commission's power to recommend compensation where it finds that the government has breached a human right.

In relation to human rights, there is no provision in Australia to legally enforce rights. Any recommendation by the Commission for compensation is unenforceable. This puts the Commission in exactly the same position as the Commonwealth Ombudsman when exercising the power to make a report under s.15(2)(f) of the Ombudsman Act. It is difficult to understand why such recommendations should be allowed to exist for many years in relation to matters of maladministration, but should be removed from legislation dealing with the equally and perhaps more momentous subject matter of human rights. This provision should not be adopted.

Issues of Concern

First, to remove this power may mean further watering down the HREOCA, which is the only Australian legislation that provides any domestic remedy for breaches of human rights contained in the International Covenant on Civil and Political Rights (ICCPR).

Second, there is no weighty reason why the power to recommend compensation should be removed. The Government rarely accepts recommendations to provide compensation, so there is no significant financial detriment to it, and a ceiling could be imposed if this was a genuine concern. If the rationale behind this amendment is simply for the Government to avoid the embarrassment of having a recommendation to pay compensation against it, this is not a valid reason. The Commission should retain its power in full to make any recommendations it sees fit to remedy human rights violations or acts of discrimination.

Instead, a proper government commitment to protection of human rights would see steps taken towards allowing enforcement of rights in respect of breaches of human rights.

Appointment of Complaints Commissioners

Amendment to Section 42

The Bill proposes to allow the Attorney General to appoint part-time complaints commissioners who must be legally qualified.

The introduction of complaints commissioners is valuable, as it will provide more assistance in complaints handling and therefore a more efficient complaints system. However, there are two reservations to be made to the amendment.

Issues of Concern

First, the complaints commissioners should not have to be legally qualified. In the past complaints commissioners who did not hold legal qualifications performed their duties quite capably and effectively, and this requirement seems overly restrictive.

Second, the fact that the complaints commissioners are to be employed on a part-time basis may raise issues with respect to the Commission's independence. Part-

time employees should not be able to take on the role of complaints commissioner whilst also simultaneously being employed in another sector of the public service or allied agency, as this will compromise their independence.

Focus on Human Rights Education and Individual Responsibility

Amendments to Sections 11 and 31 of the Human Rights and Equal Opportunity Commission Act 1986; Section 67 of the Disability Discrimination Act 1992; Section 20 of the Racial Discrimination Act 1975; and Section 48 of the Sex Discrimination Act 1986

The Bill plans to bring human rights education to the forefront of the Commission's functions with the new by-line; 'Human rights: Everyone's responsibility'.

It is a reality that victims of discrimination often experience a lack of awareness with respect to anti-discrimination laws. This of course often results in acts of discrimination that develop primarily out of ignorance. It is thus pertinent that human rights and anti-discrimination education and information dissemination be encouraged and actively pursued¹².

However, these are not new concepts – education has always been one of the policy hubs of anti-discrimination legislation and of the Commission¹³. Indeed, the Commission has an important educative impact on human rights law in Australia via its intervention role in Federal, Family, or High Court proceedings. The activities of the Commission as they stand already disseminate a significant amount of useful and relevant human rights and anti-discrimination information into the community. Also, an effective and well resourced complaints handling process highlights individual examples of discrimination at the hands of either private deeds of government policy, promoting and nurturing the development of human rights in Australian society. Overall Commission decisions and reports have added enormously to public debate about human rights in Australia, and their role as human rights educators is already entrenched¹⁴.

Issues of Concern

First, the budget cuts experienced by the Commission over recent years will impact negatively on a new educative focus. The Commission is under a statutory obligation to process complaints, and will still be required to allocate a sufficient budget to complaints handling. The money left for work on education, research, and information dissemination could be very limited which may therefore limit the effectiveness of such efforts¹⁵.

Second, it is often the case that it is governments that are responsible for human rights abuses. The new by-line emphasising individual responsibility may be seen to

¹² Senate Legal and Constitutional Committee, *Report on the Human rights Legislation Amendment Bill (No.2) 1998* [4.2].

¹³ Bills Digest No. 146 1998-99: *Human Rights Legislation Amendment Bill (No.2) 1999*.

¹⁴ Jim McKiernan, Senator for Western Australia, *Minority Report on the Human rights Legislation Amendment Bill (No.2) 1998*, 17 February 1999 [1.41 – 1.42] available @ http://www.aph.gov.au/Senate/committee/legcon_ctte/human2/report/d01.htm

¹⁵ Bills Digest No. 146 1998-99: *Human Rights Legislation Amendment Bill (No.2) 1999*.

put the emphasis on self-help by those who suffer human rights abuses, as opposed to identifying the Commission's role in assisting victims¹⁶.

Concluding Remarks

The Castan Centre is of the opinion that the provisions of the *Australian Human rights Commission Legislation Bill 2003* indicated in this submission are of great concern in jeopardising the independence of the Human Rights and Equal Opportunity Commission, and have the potential to significantly diminish the Commission's ability to defend and promote human rights in Australia. These provisions must be rejected and provisions strengthening the powers of the Commission should be put in their place.

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¹⁶ Senate Legal and Constitutional Committee, *Report on the Human rights Legislation Amendment Bill (No.2) 1998* [4.5