



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 184 2002–03

Australian Human Rights Commission Legislation Bill 2003

ISSN 1328-8091

© Copyright Commonwealth of Australia 2003

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database.

On the Internet the Department of the Parliamentary Library can be found at:

<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2003

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 184 2002-03

Australian Human Rights Commission Legislation Bill 2003

Jane Hearn
Law and Bills Digest Group
25 June 2003

Contents

Purpose	1
Background	2
History of the Bill	2
Main Provisions	3
Schedule 1 – Amendment of the Human Rights and Privacy Legislation	3
Renaming the Commission	3
Definition of Commissioner under HREOCA, RDA, SDA, DDA	3
Restructure of the Commission	3
Abolition of Aboriginal and Torres Strait Islander Social Justice Commissioner	4
Qualifications to serve as Human Rights Commissioner	4
Functions of the Australian Human Rights Commission	4
Consequential changes to the functions of the Commission in relation to the DDA, RDA and SDA	5
Requirement to use the by line – human rights – everyone’s responsibility	6

Requirement for Consent of the Attorney-General to Intervene in Proceedings	6
Centralisation of complaints handling in the President.	7
Appointment of Complaints Commissioners	7
Removal of the Commission's powers to recommend payment of compensation	8
Abolition of Community Relations Council under the RDA.	8
Transitional provisions concerning continuity of Commission and Commissioners	9
Concluding Comments.	9
Abolition of Specialised Commissioners.	10
Requirement for consent of the Attorney General to intervene in proceedings	11
Appointment of Complaints Commissioners	14
Removal of Power to Recommend Monetary Compensation for Discrimination	15
Other Jurisdictional Issues	16
Endnotes.	16

Australian Human Rights Commission Legislation Bill 2003

Date Introduced: 27 March 2003

House: House of Representatives

Portfolio: Attorney-General

Commencement: On the day which the Act receives Royal Assent. Consequential amendments to other acts outlined in Schedules 1 and 2 commence on a day to be fixed by proclamation or 6 months from the date the Act receives Royal Assent.

Purpose

The purpose of the Bill is to amend the Federal human rights legislation to:

- rename the Human Rights and Equal Opportunity Commission (the Commission) the Australian Human Rights Commission
- abolish the five specific commissioners responsible for Aboriginal and Torres Strait Islander social justice, human rights, disability, race and sex discrimination and replacing these specialised commissioners with three generic Human Rights Commissioners
- require the Commission to use the by line “*human rights – everyone’s responsibility*”
- amend the statutory functions of the Commission to emphasise education and information dissemination;
- require the consent of the Attorney-General before the Commission can seek leave of a court to intervene in a court proceeding related to human rights and discrimination;
- centralise inquiry and complaints handling under the authority of the President
- enable the Attorney-General to appoint part-time Complaints Commissioners to assist the President with the inquiry and complaint handling function
- remove the Commission’s power to recommend the payment of compensation to remedy or reduce loss or damage suffered by a victim of discrimination, and

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- repeal existing provision for establishing the Community Relations Council and Advisory Committees under the *Race Discrimination Act 1975*(RDA).

Background

History of the Bill

The majority of the provisions of this Bill were originally introduced into the House of Representatives on 8 April 1998 as the Human Rights Legislation Amendment Bill (No. 2) 1998 (the 1998 Bill). Parliamentary debate on the original 1998 Bill was not completed before the 38th Parliament was prorogued. The Bill was reintroduced as the Human Rights Legislation Amendment Bill (No.2) 1999 which subsequently lapsed when the Federal Election was called in late 2001.

Major aspects of the 1998 Bill were considered by the Senate Legal and Constitutional Legislation Committee in 1998 and 1999. The Committee's report was tabled on 17 February 1999.¹ The Majority Report of the Committee generally recommended passage of the Bill, although it also recommended several significant changes. The Minority Reports of the Opposition and the Australian Democrats recommended against passage of the Bill.²

On 13 October 1999 the Government proposed amendments to the 1999 Bill removing the requirement for approval of the Attorney-General to intervene in court proceedings and providing for continuity of three of the then current Commissioners as Deputy Presidents. The Opposition accepted the proposed amendments and the Bill passed the House of Representative on that day.

As noted above, the Human Rights Legislation Amendment Bill (No.2) 1999 lapsed in 2001. The new Australian Human Rights Commission Bill 2003 retains the major features of the earlier Bill as introduced and amended with three important differences:

- the proposed name change to “Australian Human Rights Commission” replaces the previous proposal of the “Human Rights and Responsibilities Commission”
- the Bill reinstates the requirement that the Commission obtain the consent of the Attorney-General to intervene in court proceedings, and
- introduces a new and additional power for the Attorney-General to appoint part-time Complaints Commissioners to assist the President to discharge that function.

The current Bill was referred to the Senate Legal and Constitutional Legislation Committee which reported on 29 May 2003. The Committee's report and access to submissions are available at http://www.aph.gov.au/senate/committee/legcon_ctte/reports/index.htm.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

A summary of the Committee's findings and recommendations are set out in the Concluding Comments below.

An overview of the existing Human Rights and Equal Opportunity Commission and history of Commonwealth human rights laws may be found in Bills Digest No.146, 1998-99 Human Rights Legislation Amendment Bill 1999.³ Access to the Human Rights and Equal Opportunity Commission website is through http://www.hreoc.gov.au/media_releases/2003/32_03.htm.

Main Provisions

Schedule 1 – Amendment of the Human Rights and Privacy Legislation

Renaming the Commission

Items 1 and 2 amend the title Human Rights and Equal Opportunity Commission Act 1986 ('HREOCA') to the Australian Human Rights Commission Act 1986.

Item 4 amends the definition of 'the Commission' from the Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission.

Definition of Commissioner under HREOCA, RDA, SDA, DDA⁴

Item 5 inserts the definition of Complaints Commissioner meaning a person who is appointed as a Complaints Commissioner under section 42A.

Item 7 inserts the definition of a Human Rights Commissioner meaning a member of the Commission appointed under section 8B.

Items 6, 9 and 10 consecutively repeal the definition in HREOCA of the Disability Discrimination Commissioner (DDA), the Race Discrimination Commissioner (RDA) and the Sex Discrimination Commissioner (SDA). These repeals are mirrored in amendments to the DDA, the RDA and the SDA which have the effect of abolishing the positions of the specialised Commissioners established under those Acts.

Restructure of the Commission

Item 13 deals with the composition of the Australian Human Rights Commission. It repeals the current list of:

- President
- Human Rights Commissioner
- Race Discrimination Commissioner

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Sex Discrimination Commissioner, and
- Disability Discrimination Commissioner

and replaces it with:

- President, and
- 3 Human Rights Commissioners.

Abolition of Aboriginal and Torres Strait Islander Social Justice Commissioner

Item 57 repeals subsection 46B which requires that a person appointed as the Aboriginal and Torres Strait Islander Social Justice Commissioner must have 'significant experience in community life of Aboriginal persons or Torres Strait Islanders.' This specific requirement of experience in community life of Aboriginal persons or Torres Strait Islanders is not repeated in those provisions dealing with the appointment of the three Human Rights Commissioners (see Item 19 below).

Qualifications to serve as Human Rights Commissioner

Item 18 amends subsection 8B(2) to provide that a person is not qualified to be appointed as a full time Commissioner by the Governor General (GG) unless the Minister is satisfied that the person has appropriate qualifications, knowledge or experience.

Item 19 adds subsection 8B(3) which requires that before the GG makes the appointment the Minister must be satisfied that the President, the other Human Rights Commissioner and the person, as a group, have expertise in the variety of matters likely to come before the Commission.

Functions of the Australian Human Rights Commission

Item 20 reorders the functions of the Commission to provide a focus on the following:

- promoting understanding, acceptance and public discussion of human rights in Australia and of the responsibility of persons and organisations to respect those rights
- disseminating information on human rights and the responsibility of persons and organisations to respect those rights
- undertaking research, educational and other programs promoting human rights on behalf of the Commonwealth, and
- preparing and publishing guidelines concerning human rights which can be conciliated by the Commission.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Currently, these functions of the Commission are provided for in HREOCA, except for the function of disseminating information, although this is arguably covered by the Commission's incidental power. These functions, however, have been 'upgraded' to underline their new importance. The only proposed 'higher' functions of the Commission are to:

- carry out those functions conferred by the RDA, the SDA and the DDA (currently paragraph 11(1)(a)), and
- inquire into and attempt to conciliate complaints of unlawful discrimination

Item 36 reorders the functions of the Commission under Division 4 relating to equal opportunity in employment. It amends paragraph 31(a) by inserting the following functions:

- promote understanding, acceptance and public discussion of equal opportunity in employment and the responsibility of persons and organisations to respect that equality
- disseminate information on equality of opportunity in employment and responsibilities of persons and organisations to respect that equality
- undertake research and educational programs on behalf of the Commonwealth promoting that equality, and
- prepare and publish guidelines for avoiding acts or practices which transgress these rights and responsibilities.

All these functions are already specified in the Act, except for dissemination of information, which is arguably covered by the Commission's incidental function. The existing subparagraphs s31(c), (d) and (h) which deal with these functions are repealed.

Consequential changes to the functions of the Commission in relation to the DDA, RDA and SDA

Disability Discrimination Act 1992

Item 89 provides that the first four functions of the Commission in relation to disability discrimination are:

- promoting an understanding of, acceptance of and compliance with the DDA
- disseminating information on disability discrimination and on the responsibility of persons and organisations to avoid such discrimination
- undertaking research, educational and other programs promoting the DDA on behalf of the Commonwealth, and

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- preparing and publishing guidelines concerning avoidance of disability discrimination.

Currently, all these functions are in the DDA except for dissemination of information, although this could be interpreted as covered by the Commission's current incidental powers.

Racial Discrimination Act 1975

Item 117 inserts a new function to disseminate information on racial discrimination and on the responsibility of persons and organisations to avoid such discrimination. All other functions currently listed for the Race Discrimination Commissioner remain.

Sex Discrimination Act 1984

Item 134 rearranges the functions of the Commission so that the first four functions are to:

- promote an understanding and acceptance of, and compliance with, the SDA
- disseminate information on relevant grounds and on the responsibility of persons and organisations to avoid such discrimination
- undertake research and educational programs on behalf of the Commonwealth for promotion of the SDA, and
- prepare and publish guidelines for avoiding relevant forms of discrimination under the SDA.

Currently, all these functions are in the SDA except for dissemination of information, although this could be interpreted as covered by the Commission's current incidental powers.

Requirement to use the by line – human rights – everyone's responsibility

Item 25 inserts **new subsections 11(1A) and (1B)** that require the Commission to raise public awareness of the importance of human rights by using, and encouraging the use of, the expression 'human rights – everyone's responsibility'. The Commission may incorporate the expression in its logo and its stationery but is not required to do so by the amendment.

Requirement for Consent of the Attorney-General to Intervene in Proceedings

Currently, the HREOCA, the DDA, the RDA and the SDA provide the Commission with the power to seek a court's leave to intervene in court proceedings that involve relevant human rights and discrimination issues.

Items 26 and 39 (HREOCA), **93** (DDA), **121** (RDA) and **138** (SDA) propose that any intervention by the Commission in a court hearing involving human rights or

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

discrimination issues must now have leave of the Attorney-General before seeking leave of the court.

Items 26 and 39 (HREOCA), **93** (DDA), **121** (RDA), and **138** (SDA) provide that the Attorney-General may (but need not) have regard to the following matters when considering whether approval to seek leave of the court to intervene should be granted:

- whether the Commonwealth has already intervened in the proceedings
- whether, in the Attorney's view, the proceedings may, to a significant extent, affect the human rights of, or involve issues of discrimination against, persons not parties to the proceedings
- whether, in the Attorney's view, the proceedings have significant implications for the administration of the Commonwealth disability, race and sex discrimination legislation, and
- whether, in the Attorney's view, there are special circumstances for the Commission to intervene, such as intervention being in the public interest.

Consent is not required if the President of the Commission is a Justice of the High Court or the Federal Court or was a Justice of the High Court or Federal Court immediately before becoming the President.

In these circumstances, the Commission is only required to provide written notice accompanied by a statement of why the Commission considers it appropriate to intervene. The notice must be given at a reasonable time before the Commission seeks the leave of the court.

The provisions create a two tier system where the requirement for consent depends on the status of the incumbent President at the time of the application.

Centralisation of complaints handling in the President

Item 29 provides that the President may delegate to the Complaints Commissioners the power to inquire into, conciliate complaints and report on complaints concerning an act or practice that is inconsistent with human rights or discrimination in relation to employment.

Item 31 clarifies that the President is prohibited from delegating to 'another member' of the Commission any of the President's powers in relation to the handling of complaints.

Appointment of Complaints Commissioners

Item 53 inserts **new section 42A** to enable the Attorney-General to appoint legally qualified persons as Complaints Commissioners to assist the President in discharging the complaints function. Complaints Commissioners are not members of the Commission.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Complaints Commissioner may be appointed for a period of up to five years with the possibility of further appointment. The Attorney-General has the discretion to determine the terms and conditions of appointment and to terminate the appointment at any time.

For purposes of this section, ‘legally qualified person’ means a person who is a serving or former Judge of a court created by the Commonwealth Parliament or a State Parliament (paragraph 42A(7)(a)). A Justice of the High Court would not be eligible for appointment as a Complaints Commissioner. The High Court of Australia is a creation of the Constitution not the Parliament. It also includes lawyers admitted to practice on the roll of a State or Territory Supreme Court, the High Court or a Federal Court. (paragraph 42A(7)(b)).

Item 69 inserts **new section 46PNA** which sets out the role of the Complaints Commissioner. The Complaints Commissioner has a duty to exercise the functions of the President to inquire into a complaint referred by the President and attempt to conciliate the complaint. Those functions can only be exercise when delegated by the President.

Item 32 ensures that in undertaking the delegated functions a Complaints Commissioner can act effectively by exercising any power conferred on a member of the Commission, for example, the power to obtain information and documents under section 21 of the HREOCA.

Removal of the Commission's powers to recommend payment of compensation

Items 35 repeals the Commission's power to recommend certain remedies when it considers that an act or practice has breached a the complainants human rights or amounts to discrimination (but is not unlawful discrimination under the DDA, RDA or the SDA). Currently, as part of the Commission’s complaint and inquiry function, the Commission is empowered to make recommendations for remedial action including the payment of compensation to a person who has suffered loss or damage.

Item 35 substitutes the existing paragraph 29(2)(c) with a new provision to remove the Commission’s power to recommend payment of monetary compensation of damages. The Commission’s power is recommendatory only and not enforceable in the Courts.

Abolition of Community Relations Council under the RDA

The *RDA* establishes a Community Relations Council charged with the task of advising the Minister and the Commission concerning observance and implementation of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) through promotion of educational programs, research, publication and dissemination of materials, promotion of understanding and tolerance and any other relevant matter related to observance of the Convention.

Item 124 repeals, *inter alia*, those parts (Part V and parts of Part VI) of the RDA which established the Community Relations Council and the provision of staff for the Council.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Items 103, 107, 108 and 110 repeal the RDA's definition of Chairman, Council, Deputy Chairman and member of the Community Relations Council and the Council.

The Explanatory Memorandum notes that no members have ever been appointed to the Community Relations Council so that it has never in fact come into being. The Explanatory Memorandum states that, pursuant to section 15 of HREOCA, the new Commission will retain the power to 'work with and consult appropriate persons, governmental organisations and non-governmental organisations'.

Transitional provisions concerning continuity of Commission and Commissioners

Item 144 provides that the Bill does not affect the continuity of the Commission's existence or the continuity of the appointment of the President or the Human Rights Commissioner. This will ensure that legal responsibilities of the current Commission continue under the new structure.

Item 146 provides that the existing Commissioners become the new Human Rights Commissioners, providing no more than three such Commissioners are in office at the commencement of the provision. The item also provides for preservation of benefits based on continuity of service. Each existing Commissioner will continue to hold office as a Human Rights Commissioner for the remaining period of their appointment and is eligible for reappointment.

Although the existing structure of the Commission provides for five Commissioners the position of Disability Discrimination Commissioner and Race Discrimination Commissioner have been vacant for some time. There has been only one permanent Disability Discrimination Commissioner whose term expired in December 1997. The term of the last Race Discrimination Commissioner expired in September 1999. The Bill is drafted to accommodate the existing Commissioners, it is unclear what the position would be if more than three Commissioners were currently in office.

Concluding Comments

The Australian Human Rights Commission Bill is controversial legislation that has attracted a considerable amount of public debate. As note above, the Senate Legal and Constitutional Legislation Committee inquired into and reported on the Bill in May 2003. The Report of the Committee brings together the most up to date compilation of views of a wide cross section of Aboriginal and non-Aboriginal organisations, academics, church based groups, individuals, civil liberties organisations and statutory authorities on the Bill. Over 200 submissions were made to the Committee, a significantly greater number than were submitted to the Inquiry on the 1998/1999 version of the Bill.

The majority report of the Senate Committee recommended that the Bill be passed subject to two substantive changes. First, that areas of responsibility be designated for each

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Commissioner in line with the original proposal in the 1998/1999 Bill and that the Commission not be required to obtain the consent of the Attorney-General before seeking leave to intervene in court proceedings (see below). By contrast a dissenting report by ALP, Democrat and Green Senators opposes the Bill outright and made a series of alternative proposals that would strengthen the capacity of the Commission to perform its existing functions.

These concluding comments are not exhaustive of all the issues raised by the Bill. Rather it highlights four of the key issues considered by the Senate Committee – restructuring the Commission; the requirement to obtain the Attorney-General’s consent before seeking leave to intervene in Court proceedings; the centralisation of the inquiry and complaints function and the power to appoint part-time Complaints Commissioners; and the abolition of the power to recommend monetary compensation. Finally, it briefly touches on other jurisdictional issues that have been left untouched by the Bill and were outside the scope of the Senate Committee’s inquiry.

Abolition of Specialised Commissioners

The proposal to abolish the five portfolio specific Commissioner positions and replace them with three generic Human Rights Commissioners has attracted significant criticism. The 1998/1999 version of the Bill proposed that the Commission comprise the President and three Deputy Presidents, with combined but specified areas of responsibility in:

- racial discrimination and social justice
- sex discrimination and equal opportunity, and
- human rights and disability discrimination.

In his Second Reading Speech for the 2003 Bill, the Attorney-General said the proposed reforms:

... take into account the possibility of new areas of Commission responsibility (such as age discrimination), the fact that human rights issues increasingly crossover the portfolio specific boundaries of the existing structure (such as issues relating to women with disabilities) and the social and economic environment that faces all levels of government and business.⁵

The main concerns with the abolition of specialised Commissioners have centred on the:

- loss of expertise which specialised Commissioners bring to their position
- loss of a publicly identifiable advocate for particular groups vulnerable to discrimination and human rights abuse, and
- the undermining of the advocacy and educational role of the Commission.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Particular concern has been expressed in relation to the loss of a specialised Aboriginal and Torres Strait Islander Justice Commissioner. A number of Aboriginal organisations, legal and church based groups, academics, and non-indigenous civil liberties organisations strongly advocated the retention of this position. Amongst those who made submissions was the former Royal Commissioner into Aboriginal Deaths in Custody and former Deputy President of the Native Title Tribunal, the Hon Hal Wooten AC QC. He argued that the complex nature of the issues facing indigenous Australia meant it is crucial to have an independent, specialised and informed Commissioner able to keep issue of indigenous human rights before the Government.⁶

Recommendation 1 (a) of the majority report favours a reduction in the number of Commissioners from five to three but proposed that the Human Rights Commissioners have designated areas of responsibility such as:

- human rights and disabilities
- sex discrimination, and
- race discrimination and Aboriginal and Torres Strait Islander social justice.

The Senate Committee also recommended that one of the Commissioners be required to have significant experience in the community life of Aboriginal persons or Torres Strait Islanders (Rec 1 (b)). The ALP members supported Recommendation 1 (b) as this is consistent with their view expressed in the dissenting report.

By contrast the dissenting report opposed the restructuring of the Commission as an entrenchment of the existing status quo. ALP, Green and Democrat members called for restoration of funds to enable the appointment of a Disability and Race Discrimination Commissioner to the two existing but vacant positions. They pointed to the need to maintain the existing 5 positions in order to ensure the capacity of the Commission to deal with issues concerning children, age discrimination, the mentally ill and other relevant groups.⁷

Requirement for consent of the Attorney General to intervene in proceedings

Under paragraph 11(1)(o) of the HREOCA the Commission has a discretion to seek leave to intervene in court proceedings that involve human rights issues, where the Commission considers it appropriate to do so. Paragraph 31(j) provides for a similar function in relation to equal opportunity and discrimination functions under the RDA, SDA and the DDA in relation to issues of race, sex, marital status, pregnancy and disability discrimination.

Almost all submissions to the Committee opposed the proposed requirement that the Commission seek and obtain the consent of the Attorney-General before seeking leave to intervene in proceedings. The Australian Council for Human Rights Agencies (ACHRA), a new human rights group formed in February 2003 by State and Territory Equal

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Opportunity and Anti-Discrimination Agencies publicly condemned the proposal as a degrading of the independence of the Commission.⁸ The ACHRA is made up of Commissioners and Presidents of the agencies.

The Explanatory Memorandum explains the rationale for the proposal as ensuring that the ‘intervention power is only exercised after the broader interests of the community have been taken into account’.⁹ In his Second Reading Speech the Attorney-General said that:

This requirement is not intended 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.

The Government’s position has been criticised as failing to indicate what those broader interests are and how those interests might be adversely affected by the Commission exercising its intervention powers that are designed to ensure the Courts are able to give proper consideration to human rights issues. A number of witnesses to the Senate Committee argued that there is no evidence that the Commission’s intervention power has been used excessively or frivolously. One Senior Counsel informed the Committee that none of the Commission’s interventions had attracted criticism from judges for lacking relevance or expertise.¹⁰

Costs and Appropriateness of Interventions

In relation to costs, the President of HREOC, Professor Alice Tay, gave evidence that the Commission has spent:

\$200,000 (or 0.5% of its budget) on 18 interventions over the past three financial years, averaging \$11,000 for each case. Early preparatory work is done in-house by instructing solicitors and senior counsel have worked either pro bono or on reduced rates.¹¹

The President also informed the Committee that since the Commission was established in 1986, it had been granted permission to intervene in all 35 cases in which leave to intervene had been sought. In evidence before the Committee the Attorney-General’s Department told the Committee that the Attorney-General was concerned that the Commission had used its intervention power “inappropriately” and unnecessarily. The only case in which the Attorney-General has publicly criticised HREOC’s intervention as inappropriate is the family law case of *B & B*, a matter in which the Attorney-General also intervened with opposing argument.¹²

Professor Tay gave evidence that in 16 of 18 cases in which both the Commission and the Commonwealth had been parties, the Commonwealth’s arguments were contrary to the Commission’s. Details of those cases are set out in Appendix 6 to the Committee’s report. These cases have covered a broad range of significant human rights issues such as, the right of access to lawyers by asylum seekers in detention, scope of the races power under section 51 (xxvi) of the Constitution, definition of native title rights, criminal deportation

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

of a person in immigration detention, the detention of persons aboard the MV Tampa, the right of a person with a transsexual history to marry, the privative clause in the *Migration Act 1958* and death of asylum seekers off Ashmore Reef.

Accountability – Unfettered Power to Withhold Consent

As noted above, the Bill sets out a range of matters in proposed new subsection 11(5)¹³ as an indication of the types of matters the Attorney-General *may* wish to consider when deciding whether or not to give his approval. However, the discretion is in fact unfettered by any limitation and consequently it confers an unlimited executive power upon the Attorney General to decide whether or not to give consent. This leaves open the possibility for the Attorney-General to be influenced by matters not specified in the Bill but is drafted so broadly that it effectively avoids the possibility of judicial review.

In evidence before the Committee the Attorney-General's Department acknowledged that insufficient accountability had been built into the Bill. In particular, the Bill (a) did not require the Attorney-General to make public what matters would be taken into account when making the decision and (b) the legislation does not give any right of review of the decision.¹⁴

While in theory, judicial review of the decision is available under the *Administrative Decision (Judicial Review) Act 1977* (Clth), the broad ranging nature of the discretion means the grounds of available review under the Act are unlikely to yield fruit. Consequently, there would be little utility in the Commission seeking to overcome instances of unwarranted interference in the exercise of the Commission's functions through the courts.

Constitutional Issues- Interference in Judicial Process

A number of witnesses expressed the view that conferring such a power on the Attorney-General is an inappropriate interference with the judicial process.¹⁵ They pointed to the conflict of interest in conferring the power to decide a question of intervention on a member of the government and of a political party who may be unable to exercise an independent judgment.¹⁶ It was also argued that such a decision making power comes close to interference in the judicial process.¹⁷ Professor George Williams and Ms Ronnit Redman said that:

The Bill's interference with the judicial process may become acute (and possibly raise constitutional issues) when the Commonwealth or the Attorney-General is a party to the litigation. The power to veto the participation of an intervening third party may enable the Attorney-General to influence the outcome of the litigation. This might arise where the veto is used to prevent the Commission from intervening in cases raising the constitutionality of legislation that would infringe human rights (for example in *Kartinyeri v Commonwealth* (1997) 190 CLR 1).¹⁸

Conflict with the "Paris Principles"

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The *Paris Principles* is an international instrument which sets out an agreed set of minimum standards for national human rights institutions.¹⁹ The Paris Principles is the basic instrument relied on by Australia in promoting the establishment of independent human rights institutions in the Asia Pacific Region. Central to the Paris Principles is the requirement for national governments to guarantee institutional independence to enable the organisation to freely pursue its mandate to promote and protect human rights. This includes the provision of advisory opinions to bodies competent to decide questions of human rights law.²⁰

Recommendation 2 of the majority report proposed this aspect of the Bill not be agreed to and that other informal arrangements to improve communication between the Commission and the Attorney-General be considered to alleviate any potential difficulties that an intervention may raise. It was also recommended that the Bill might be amended to require the Commission to provide details on all interventions in its annual report.

Appointment of Complaints Commissioners

The Bill completes the centralisation of complaints handling function of the Commission under the authority of the President. It achieves this by repealing subsection 19(2A) and (2B) which allow the President to delegate to the Human Rights Commissioner the power to deal with complaints in relation to alleged breaches of human rights²¹ and discrimination in employment.²² New subsection 19(2A) prevents the President from delegating any power in relation to complaints to any other Commissioners, including the Human Rights Commissioner.

However, as noted above, the Bill enables the Attorney-General to appoint legally qualified persons on a part-time basis for up to 5 years to deal exclusively with complaints. In his Second Reading Speech the Attorney-General said that:

In order to provide a further option for managing complaint-handling workloads. I will be able to appoint legally qualified persons as Complaints Commissioners on a part-time basis to assist the President with these functions. Work will be allocated to a Complaints Commissioner by the President.

In its submission to the Senate Committee, the Commission gave evidence that the amendment was unnecessary as there were no undue delays in processing complaints. The Commission also pointed out that the President already has, and retains under this Bill, the power to delegate her powers to members of the staff of the Commission and, if necessary, to a person outside the Commission. The President indicated that this includes a delegation to a person such as a retired judge or legally qualified person if that was considered necessary.²³

Lack of statutory independence

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Importantly, a Complaints Commissioner would not be a statutory member of the Commission. Rather, the Bill enables the Attorney-General to determine the terms and conditions of appointment and to terminate the appointment at any time. While this will provide the Government with flexibility to adjust appointments to work flow, the proposal is also open to criticism as it fails to provide statutory independence to safeguard appointees from political interference or pressure to achieve certain results. Vesting control of appointment of the Complaints Commissioners in the hands of the Attorney-General also means that, while the President is required to delegate the inquiry and complaints handling functions to them, the President has little control over whether the person is suitably qualified to perform the task or to manage performance such as the meetings of deadlines and consistent decisions making.²⁴

A number of submissions objected to this aspect of the Bill. The majority of the Committee did not oppose the appointment of Complaints Commissioners. In the dissenting report the ALP, Democrat and Green Senators opposed the further limitation on the President's power to delegate her inquiry power. The minority report proposed that the President be able to delegate inquiry and complaints handling to any other member of the Commission. This approach supports the submission put by the Commission to the Senate Committee.

Removal of Power to Recommend Monetary Compensation for Discrimination

Where the Commission finds that an act or practice constitutes discrimination it has the power under paragraph 29(2)(c) to make recommendations for action, including the payment of compensation, to remedy a loss or damage suffered as a result of the discrimination. As noted above, the Bill repeals paragraph 29(2)(c) and replaces it with provision that allows the Commission to make recommendations for remedial action but prohibits the recommending of monetary compensation.

In evidence to the Senate Committee the Attorney-General's Department explained the existing power as an anomaly and said it was inappropriate for an administrative body that could not enforce the recommendation to have such a power.²⁵ In reply the Commission argued that, while such recommendations are unenforceable, they formed an important part of the Commission ability to conciliate complaints and in fact respondents have paid the compensation in 27% of cases. The Commission also informed the Senate Committee that the Commonwealth was the respondent in 60% of matters where the Commission had recommended financial compensation in its reports to the Attorney-General but no compensation was paid.²⁶ The Commission also referred to comparable powers to make non-enforceable recommendations for compensation by other investigative bodies such as the Commonwealth Ombudsman.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Other Jurisdictional Issues

The task of the Senate Committee was to inquire into the provisions of the proposed Bill. Consequently, there was little scope to examine other issues relevant to the functioning of the Commission. One issue which has yet to be analysed in detail is whether the Commission has a sufficiently wide jurisdiction to inquire into complaints concerning the broad range of human rights issues that arise for particular segments of the Australian community.

For example, while the Commission can deal with the allegations of arbitrary detention and inhumane treatment of asylum seekers under the International Covenant on Civil and Political Rights (ICCPR), it has no express jurisdiction to deal comprehensively with the civil, political, economic, social and cultural rights of refugees protected by the 1951 Convention Relating to the Status of Refugees (CSR). Similarly, the Commission has a limited jurisdiction to deal with economic, social or cultural rights of the wider community and yet the Commission is under a statutory duty to ensure that it discharges its function with regard for the 'indivisibility' of human rights.²⁷ Consequently, there is an outstanding issue as to whether the 1951 Convention Relating to the Status of Refugees and the International Covenant on Economic, Social or Cultural Rights (ICESCR) should be declared instruments under the HREOCA and scheduled to the Act. The ICCPR²⁸ and ICESCR, together with the UN Declaration on Human Rights, make up the International Bill of Rights which sits at the apex of the system of international human rights law.

Similarly, the Commission has limited jurisdiction in relation to prisoners who are primarily the responsibility of State or Territory Governments. This is a major shortcoming in Australia's national human rights institution that has failed to attract much attention. In the absence of Bills of Rights at the State and Territory level prisoners depend on a patchwork of tort and administrative law to ensure accountability for standards of treatment during incarceration. Under the Australian Constitution the management of prisons is a responsibility of the States. It is arguable that the Commission has jurisdiction in relation to Federal prisoners held in State prisons on behalf of the Commonwealth. And, under international law, it is the responsibility of the Commonwealth to ensure that State and Territory Governments act consistently with Australia's treaty obligations.

Endnotes

- 1 Following a recommendation by the Selection of Bills Committee, the Senate referred the 1998 Bill to the Senate Legal and Constitutional Legislation Committee on 14 May 1998, for inquiry and report by 10 August 1998. An interim report was presented on 10 August 1998, however before the final report of the Committee could be tabled, the 1998 Federal election was called and the committee was unable to continue its consideration of the 1998 Bill. After the election, the provisions of the 1998 Bill were referred to the re-constituted Committee on

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

12 November 1998, for report by 1 December 1998. The Committee's report was tabled on 17 February 1999.

- 2 A copy of the Senate Legal and Constitutional Committee report may be obtained through <http://www.aph.gov.au/senate/committee/legcon-human2/report/b01.htm>.
- 3 Available at: <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd146.htm> .
- 4 *Human Rights and Equal Opportunity Commission Act 1986*, (HREOCA), *Race Discrimination Act 1975* (RDA), *Sex Discrimination Act 1984* (SDA), *Disability Discrimination Act 1992* (DDA).
- 5 The Commission will retain the right to determine its administrative support structure, including the retention of its specialist policy units.
- 6 Submission 72, p. 3.
- 7 *Provisions of the Australian Human Rights Commission Legislation Bill 2003*, Legal and Constitutional Legislation Committee, Department of the Senate, Clth of Australia, May 2003, p. 61.
- 8 *ACHRA condemns government move to strip powers from Human Rights and Equal Opportunity Commission*, <http://www.eoc.sa.gov.au/access/ACHRA.html>, 26 May 2003.
- 9 Explanatory Memorandum, p. 9.
- 10 See for example the evidence of Mr Bret Walker SC, President of the NSW Bar Association. Committee Hansard, 29 April 2003 p. 15.
- 11 Committee Hansard, 29 April 2003, p. 3.
- 12 *B & B: Family Law Reform Act 1995* (1997) FLC 92. In *B & B* case HREOC intervened with a submission supporting the right of a wife to relocate with her two children. The HREOC submission argued that the Court should have regard to the constitutional rights of adults to freedom of movement and the Convention on the Rights of the Child. The Attorney-General also intervened in those proceedings arguing against the use by the Court of any international human rights treaties and in particular the Convention on the Rights of the Child in the interpretation of the *Family Law Reform Act*.
- 13 See also proposed subsection 31(2) and equivalent provisions of the DDA, SDA, and RDA.
- 14 Committee Hasard, 14 May 2003, pp 72–73.
- 15 Professor George Williams and Ms Ronnit Redman, Gilbert and Tobin Centre of Public Law, University New South Wales, Submission 9, p. 2.
- 16 Law Institute of Victoria, Submission 158A, p. 2.
- 17 Liberty Victoria, Submission 112, p. 2.
- 18 Submission 9, p. 2.
- 19 The Paris Principles were adopted by the United Nations Commission on Human Rights in May 1992 (Resolution 1992/54) and by the United National General Assembly in resolution A/RES/48/134 on 20 December 1993.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 20 A copy of the Paris Principles appears as Appendix 4 to the Committee Report
- 21 Part II Division 2 section 11 (f) provides that it is a function of the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right, to conciliate the complaint and achieve a settlement and where conciliation is not appropriate or not achieved to make a report to the Minister on the matter. 'Human rights' is defined by reference to the international instruments declared under s47 of the HREOCA and which appear in schedules to the Act. To date the declared instruments are: Convention Concerning Discrimination in Respect of Employment and Occupation; International Covenant on Civil and Political Rights; Declaration on the Rights of the Child; Declaration on the Rights of Mentally Retarded Persons; Declaration on the Rights of Disabled Persons.
- 22 Part II Division 4 section 31 of HREOCA sets out the Commission's functions in relation to equal opportunity in employment.
- 23 Submission 103, p. 18.
- 24 See HREOC Submission 103 p. 18.
- 25 Committee Hansard, 14 May 2003, p. 67.
- 26 Submission 103, p 16.
- 27 See section 10A of the HREOCA for the duties of the Commission. The concept of indivisibility in international human rights law is a reference to the interdependence of civil, political, cultural, social and economic rights. Indivisibility is shorthand for the idea that the full realisation of civil and political rights depends upon the effective protection of economic, social and cultural rights and *vice versa*. The UN Committee on Economic, Social and Cultural Rights in its Concluding Observations on Australia's third periodic report under the treaty recommended that Australia incorporate the ICESCR into domestic law. Declaring the ICESCR as an international instrument for the purpose of the HREOCA would be a small step in that direction (E/C.12/1/Add.50, 1 September 2000, para 24.)
- 28 The First Optional Protocol to the ICCPR which provides an mechanism for individual complaints to the UN Human Rights Committee is included in the instruments that comprise the International Bill of Rights.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.