



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SIXTH REPORT

OF

2004

12 May 2004

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MEMBERS OF THE COMMITTEE

Senator T Crossin (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator D Johnston
Senator J McLucas
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 2004

The Committee presents its Sixth Report of 2004 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Sexuality and Gender Identity Discrimination Bill 2003

Sexuality and Gender Identity Discrimination Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 16 of 2003*, in which it made various comments. Senator Greig has responded to those comments in a letter dated 16 April 2004. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Senator's response are discussed below.

Extract from Alert Digest No. 16 of 2003

[Introduced into the Senate on 26 November 2003 by Senator Greig as a Private Senator's bill.]

The bill prohibits discrimination against sexual minorities, transgender and intersex citizens; legally recognizes same-sex couples under Commonwealth law; and provides avenues of redress for gay, lesbian, bisexual, transgender and intersex (GLBTI) citizens who have been discriminated against in the public and private sector.

The bill also amends the *Human Rights and Equal Opportunity Commission Act 1986* and contains a regulation-making power.

Delegation of legislative power

Clause 34

Clause 34 of this bill would permit the Human Rights and Equal Opportunities Commission to delegate 'all or any of the powers conferred on the Commission' under this bill to any 'person or body of people'. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. The Committee raised a similar concern with the delegation powers in the Aged Discrimination Bill 2003 and draws the Senator's attention to its comments in its Fifteenth Report of 2003 on this matter. Notwithstanding these comments, the Committee **seeks advice of the proposer of the bill** as to the reason for this completely unfettered discretion being vested in the Commission, and to inquire whether it would not be possible to limit the categories of persons or bodies to whom (or which) such a delegation may be made.

Pending the Senator's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Senator

I write in response to queries raised by the *Scrutiny of Bills Committee* in Alert Digest No. 16 of 2003 (3 December 2003), about the breadth of delegation powers granted to the Human Rights and Equal Opportunity Commission (HREOC), in Clause 34 of the Sexuality and Gender Identity Discrimination Bill 2003 (the Bill).

I apologise for the delay in responding.

Clause 34 (1), of the Bill permits the Commission to delegate any of its powers to certain persons including to a member of the Commission, a member of staff of the Commission, or another person or body of people.

The only exception are those roles contained in Section 26, that include the Commissioner's responsibility for issues of sexuality and gender identity discrimination, and the President's responsibility to report after two years on the management of complaints, and the appropriateness of the Sex Discrimination Commissioner continuing to have responsibility for sexuality and gender identity discrimination issues.

Clause 34 (2), provides that all or any of the powers exercisable by the Commissioner under the Act of the Bill may be delegated by the Commissioner to a member of staff of the Commission approved by the Commission.

In seeking advice on the need for unfettered delegation powers being vested in HREOC, the Committee drew my attention to advice sought from the Attorney General in relation to similar provisions contained in the Age Discrimination Bill 2003.

In his response dated 16 September 2003, then Attorney General Daryl Williams, argued it is important that the Commission has sufficient flexibility to delegate its powers to persons with particular expertise, to enable it to undertake its responsibilities in the most effective manner.

He further argued that similar delegation powers currently exist in all Commonwealth anti-discrimination laws and that these powers have been used by the Commission in the performance of its functions under those laws.

Like other forms of discrimination, sexuality and gender identity discrimination is often complex in nature yet subtle in delivery. It shares many of the hallmarks of other types of discrimination yet is quite distinct in its manifestation and impact.

Given that the Bill confers responsibility for sexuality and gender identity discrimination upon the existing Sex Discrimination Commissioner rather than on a specialist Commissioner, and that sexuality and gender identity discrimination is different to sex discrimination, it will be essential in my view that the Commissioner is able to draw upon relevant expertise from any appropriate source to assist the Commissioner fulfil her or his role.

I trust this information is of use to the Committee, and welcome any further discourse with the Committee on the matter.

The Committee thanks the Senator for this response.

Trish Crossin
Chair



PARLIAMENT OF AUSTRALIA • THE SENATE

SENATOR BRIAN GREIG

Australian Democrats: Western Australia

RECEIVED

20 APR 2004

Senate Standing C'ttee
for the Scrutiny of Bills

Senator Trish Crossin
Chair, Standing Committee for the Scrutiny of Bills
Parliament House
Canberra ACT 2600

16 April 2004

TRISH
Dear Senator,

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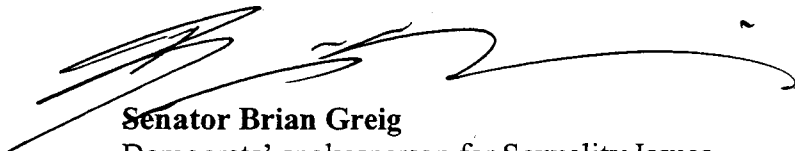
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I trust this information is of use to the Committee, and welcome any further discourse with the Committee on the matter.

Yours Sincerely,



Senator Brian Greig
Democrats' spokesperson for Sexuality Issues