



Australian
Human Rights
Commission

everyone, everywhere, everyday

1

President

The Hon Catherine Branson QC

Senate Legal and Constitutional Affairs Committee
Additional Estimates 2011-12, 13 & 14 February 2012

7 December 2011

The Hon Penny Wong
Minister for Finance and Deregulation
Parliament House
PO Box 6022
CANBERRA ACT 2600

Tabled Document 1

By: Australian Human Rights
Commission

Date: 14/2/2012

By email also: senator.wong@aph.gov.au

Dear Minister Wong

Impact of additional efficiency dividend on sustainability of the Australian Human Rights Commission

I refer to the Government's announcement on 29 November 2011 that it will apply an additional one-off efficiency dividend of 2.5 per cent in 2012-13 to the majority of Commonwealth agencies.¹

I write to bring to your attention the likely impact of this additional dividend (which I am advised will, in the case of the Australian Human Rights Commission, amount to \$1.6m over 4 years) on the Commission. In particular I wish to draw your attention to its potential to:

- impact substantially on the ability of the Commission to perform its key statutory functions; and
- place at risk the Commission's accreditation as a 'status A' national human rights institution (NHRI).

In doing so, I note that a number of agencies (such as courts and tribunals) that share common characteristics with the Commission have been exempted from the application of this additional dividend for 2012-13.

In light of the issues identified below, I would appreciate the opportunity to meet with you to discuss the implications of applying the additional 'efficiency dividend' to the Commission.

¹ Statement by the Hon Wayne Swan MP and the Hon Penny Wong MP, *Mid-year economic and fiscal outlook 2011-12*, Commonwealth of Australia, 2011, p8.

1 Ability to perform key statutory functions

Key functions of the Commission include complaint handling and related access to justice functions in three distinct areas: unlawful discrimination, discrimination that impairs equality of opportunity in employment or occupation and breaches of human rights. The Commission is obliged to exercise its complaints related inquiry and conciliations functions on receipt of complaints in writing. It is in this respect in the same position as a court or tribunal.

Despite a substantial increase in the number of complaints and related enquiries received in recent years, the Commission has received limited additional budget support for these functions. Indeed, the Commission lost substantial funding (\$5.9m over 4 years) when *Work Choices* legislation was repealed, despite the number of complaints coming to the Commission alleging discrimination continuing to rise significantly. Detailed information about the numbers of enquiries and complaints made to the Commission over the past six years is included in **Attachment A**.

There is a strong likelihood that we will see a further increase in complaints and enquiries, without an associated increase in funding to handle them, as a result of:

- Increased public awareness of rights flowing from implementation of Australia's Human Rights Framework, the recent appointment of Australia's first Age Discrimination Commissioner and the Commission's having full-time Race, Disability and Sex Discrimination Commissioners for the first time in over a decade. By way of illustration, in the first four months of the term of Susan Ryan AO as Age Discrimination Commissioner, inquiries about age discrimination have increased by 65% and complaints received in this area have increased by 44% when compared with the same period in the previous reporting year.
- Recent legislative amendments extending the operation of the *Sex Discrimination Act 1984* to areas relating to men, family responsibilities and sexual harassment.
- The Commission's being a referral agency for complaints under the *Fair Work Act* and under recently enacted legislation concerning overseas students. The Fair Work Ombudsman can, and does, directly transfer complaints of workplace discrimination to the Commission where it is assessed that the matter can be better dealt with by the Commission due to the Commission's focus on early resolution and alternative dispute resolution processes. Additionally, under the *Education Services for Overseas Students (ESOS) Legislation Amendment Act 2011*, the Overseas Student Ombudsman can directly transfer complaints to the Commission. It is envisaged that a similar provision will be included in proposed public interest disclosure legislation that will provide protection to whistle blowers. As I understand it, it is not presently proposed that any funding be provided to the Commission to assist it to fulfil these additional functions.

- The increasing number of human rights complaints and enquiries coming to the Commission. This class of complaints predominately relates to the length of, and conditions in, immigration detention and the implementation of migration policies more broadly. These complaints tend to be costly to handle because of their relationship to Government policy, the fact that most complainants are unrepresented, the need for costly interpreter and translation services and the need for detailed investigations that are sensitive to the complexity of migration law.

The Commission has made significant efforts to increase the efficiency of its complaint handling functions including to ensure that complaints are handled in a timely and effective manner. We have developed expedited processes which including the triaging of complaints which appear likely to benefit from prompt intervention. We are continuing to engage with users of our complaints handling service in an endeavour to identify yet further efficiencies. The Commission redirected funds in 2010-11 to establish an Unallocated Complaints Team to reduce the backlog in cases that had arisen during the previous reporting year – there is not, however, sufficient ongoing funding available to the Commission to maintain this initiative. The pressures of work now impacting on our complaint handling staff and our legal team are considerable and, I believe, unsustainable in the medium term without adverse workplace health and safety issues arising.

2 Concern about the impact of funding levels on the capacity of the Commission to operate as an independent national human rights institution

In recent years, the only additional funding received by the Commission has been for specific purposes or activities. For example: we have received administered funding to implement a National Anti-Racism Strategy, and funding to pay and support two new full time Commissioners and to conduct activities under the Australian Human Rights Framework.

When combined with the issues outlined above relating to complaint handling, this has seen a steady reduction in the proportion of the Commission's budget that can be applied in a discretionary manner. Having the capacity to react as it considers appropriate to situations, including emerging situations, that give rise to human rights concerns is critical to the independence and integrity of the Commission as a national human rights institution (NHRI).

I note that the impact of efficiency dividends on our capacity to perform our role as Australia's national human rights institution has been identified in Geneva as a factor that impinges on the Commission's independence.

In 2011, the Commission was re-accredited as an 'A status' national human rights institution; that is, as a NHRI that complies with the UN *Principles relating to the Status of National Institutions* adopted by the General Assembly of the United Nations (the 'Paris

Principles').² These principles require that the Commission have sufficient independence, breadth of powers and robustness to be genuinely independent in the performance of its duties.

In confirming the Commission's 'A status', the Sub-Committee on Accreditation of the International Coordinating Committee of National Human Rights Institutions noted the Australian Government policy to apply an annual efficiency dividend to all government agencies. Its report noted that:

the regular application of an efficiency dividend to the AHRC has the potential to gradually erode its base level of funding and therefore reduce its capacity to fulfil its mandate. The Sub-Committee notes that to function effectively, a national human rights commission must be provided with an appropriate level of funding and staffing in order to allow it to fulfil its mandated activities. The Sub-Committee refers to Paris Principles B.2 and to General Observation 2.6 on "Adequate Funding".³

In this regard I note that the Australian Government has spoken in the Human Rights Council of the UN to emphasise the importance of other countries establishing and maintaining 'A status' NHRIs and might be expected to be embarrassed should questions be raised concerning the status of its own NHRI. I refer in particular to observations made by Australia during the UPR process, to Australia's role as lead sponsor of an historic resolution in the UN Human Rights Council on the importance of national human rights institutions⁴ and its current co-sponsorship of a UN General Assembly Resolution on *National institutions for the promotion and protection of human rights*.⁵

3 The Commission has implemented substantial efficiency measures

In raising with you the likely impact on the Commission of the additional 'efficiency dividend', I wish to emphasise that the Commission has made genuine efforts over recent years to realise significant efficiency gains through:

- Operating a shared services model for our corporate support areas, under which we provide these services to the Office of the Australian Information

² *Principles relating to the Status of National Institutions (The Paris Principles)*, Adopted by the United Nations General Assembly - Resolution 48/134 of 20 December 1993. See: <http://www2.ohchr.org/english/law/parisprinciples.htm>.

³ ICC Sub-Committee on Accreditation, Report – 23-27 May 2011, Specific comments on the re-accreditation application of the Australian Human Rights Commission, pp10-11, online at: <http://www.asiapacificforum.net/working-with-others/icc/sub-committee-on-accreditation>.

⁴ Human Rights Council, *National institutions for the promotion and protection of human rights* 17th sess, 33rd mtg, Agenda Item 8, UN Doc A/HRC/RES/17/9 (6 July 2011).

⁵ UN Doc: A/C.3/66/L.49/Rev.1, 16 November 2011. Paragraph 11 of the resolution 'Stresses the importance of the financial and administrative independence and stability of national human rights institutions for the promotion and protection of human rights...'

Commission and also the Asia-Pacific Forum of National Human Rights Institutions to the financial benefit of the Commonwealth.

- Developing expedited processes for our complaint handling work, as noted above, to ensure swift access to justice and operational efficiency and to reduce a backlog in cases.
- Agreeing arrangements with like agencies, such as the Commonwealth Ombudsman and Fair Work Ombudsman, for handling complaints to ensure maximum efficiency and minimal duplication in the interest of the Commonwealth.
- Relocating our offices to more cost effective premises at the earliest opportunity.
- Undertaking a restructure of our human rights policy areas (that support the work of our statutory office holders) to ensure maximum coordination and efficiency.
- Exploring partnership approaches to fund 'non-core' areas of our work.
- Booking economy class tickets for all domestic airline travel by our statutory officer holders (including me) and our senior executive staff. Additionally, I now rarely travel by Comcar ordinarily choosing to travel by train or taxi instead.

While we continue to search for ways in which we can improve the efficiency of our practices, I am not persuaded that further appreciable efficiency gains are realistically available to the Commission.

4 Agencies that are exempt from this efficiency dividend have similar characteristics to the Commission

I note that the Government has chosen to exempt a number of agencies from the application of this additional dividend. Most relevantly, these agencies include the courts and tribunals and Aboriginal and Torres Strait Islander organisations.

The Commission shares the following characteristics with these organisations:

- A substantial proportion of the Commission's budget is directed to addressing the caseload that arises from our complaint handling jurisdiction. While, as mentioned above, the Commission strives to ensure that this jurisdiction is administered in an efficient and effective manner, the size of the caseload that we are required to administer is determined by external factors and bears no direct relationship to the funding levels provided to the Commission. In this context, making adjustments on a one off, short term basis is particularly difficult. In this regard we are in a similar situation to the courts and tribunals that have been exempted from the additional dividend. As discussed further

below, we are also in a similar position to these agencies in that the remuneration of our statutory officeholders is fixed by the Remuneration Tribunal and is thus beyond our control.

- The Commission also exercises a range of functions relating to Aboriginal and Torres Strait Islander peoples, including through the work of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Race Discrimination Commissioner and Sex Discrimination Commissioner. The additional dividend will impact on the ability of all Commissioners to focus on the serious human rights issues facing Aboriginal and Torres Strait Islander communities.

5 The Commission's expenditure on areas of 'expected efficiencies' is already low

The mid-year economic review notes that the additional dividend will lead to 'expected efficiencies' in a range of areas, through reductions in the use of consultants/contractors; hospitality and entertainment expenditure; legal expenses; international/domestic travel (through the use of the Government's telepresence facilities); media buy and recruitment advertising; printing and publication costs and training costs.

The application of an additional dividend on the Commission's budget will not result in any significant reduction in these types of costs, as our costs of this character are already minimal. For instance:

- Most international travel of the Commission is funded externally, principally through AusAid technical assistance programs (in 2010-11 the Commission spent \$0.6m on international travel of which approx. 75% was related to the implementation of the AusAID funded cooperation programs with China and Vietnam).
- The Commission does not routinely advertise in media or regularly purchase media.
- The Commission has already moved to substantial reliance on electronic publication of our resources and is increasingly moving to engage with the public via social media rather than by other more expensive means. For these reasons our printing costs are most commonly incurred as a result of parliamentary tabling requirements which we are unable to control.
- Most Commission training and legal advice is provided in-house.
- Because of the costs involved, the Commission makes minimal use of consultants, except where initiatives are separately funded.

6 Challenges to the Commission's sustainability

The additional dividend has come at a time when the Commission is already facing challenges to its ongoing sustainability due to the combination of the following factors – each of which will be exacerbated by the application of the additional dividend:

- The comparatively small size of the Commission's budget, which makes us particularly vulnerable to a 'long term price/cost squeeze'. Our funding has not increased at the same rate as general increases in costs (such as staffing costs). The cumulative impact of efficiency dividends over the years combined with limited new funding has been to stretch our capacity severely, with our staff paid at the lower end of the public service spectrum (while working in one of the cities with the highest cost of living in Australia) and consistently carrying heavy workloads.
- The limited opportunities for new budget initiatives for the Commission being funded (often because they fall below the minimum amounts for consideration through the NPP process)
- The challenges outlined above in managing our growing complaints caseload.
- The impact on our budget of having an executive team comprised of 6 statutory officer holders whose terms and conditions are set by the Remuneration Tribunal without corresponding funding being provided to the Commission. This is in contrast to the position of courts and tribunals which, as I understand it, do receive increases to meet their comparable costs. In the Commission's case, statutory officers' remuneration made up \$1.1m or 9.3% of total employee salary costs in 2010-11. From July 2011 these costs increased by approx. 50% with the appointment of two further Commissioners. Remuneration Tribunal rates of increase have always exceeded the net appropriation funding movements resulting in an ongoing cost transference from operational activities.

7 Conclusion

I am acutely conscious of the difficult financial environment that is currently being faced by the Government and accepted the need for the Commission, like other public sector agencies, to exercise restraint. It is for this reason that I did not seek additional funding for the Commission during the present budget process. However, the recent announcement, which for good reason does not reach to all public sector agencies, will place the Commission in a singularly embarrassing position. The Commission has struggled for many years to cope with the impact of the ongoing efficiency dividend and will be able to survive the imposition of this additional dividend in 2012-13 only by directing funding away from the purposes for which it was provided to us.

I would welcome the opportunity to discuss my concerns with you at your earliest convenience and to explore potential options for remedying this situation. These options appear to include one or more of the following:

- Exempting the Commission from the application of this additional dividend on terms similar to agencies with comparable functions/roles.
- Quarantining at least part of the Commission's funding base (particularly as it relates to access to justice services and services for Aboriginal and Torres Strait Islander peoples) from the application of future efficiency dividends, and additional one off dividends, consistent with arrangements for some other departments and agencies.
- Direct budget funding of the remuneration of the Commission's statutory office holders.
- Alternative funding options to address the longstanding funding challenges faced by the Commission.

Yours sincerely



Catherine Branson
President

T +61 2 9284 9614
F +61 2 9284 9794
E associate@humanrights.gov.au

CC: The Hon Robert McClelland MP
Attorney-General
Parliament House
By email: attorney@ag.gov.au

Mr David Tune PSM
Secretary
Department of Finance and Deregulation
By email: david.tune@finance.gov.au

Mr David Fredericks
Deputy Secretary, Civil Justice & Legal Services Group
Attorney-General's Department
By email: david.fredericks@ag.gov.au

Mr Greg Manning
First Assistant Secretary, International Law and Human Rights Division
Attorney-General's Department
By email: greg.manning@ag.gov.au

ATTACHMENT A

Snapshot: Increased enquiries and complaints received by the Australian Human Rights Commission, 2005 – 2011

Overview

The Commission's access to justice services involve providing information about the law and the complaint process to people from all areas of Australia (primarily a enquiry and complaints hotline); and the investigation and conciliation of complaints lodged under federal anti-discrimination and human rights law.

These services are focused on informal dispute resolution in order to provide an accessible, timely and cost efficient way for parties to deal with human rights and discrimination related disputes. In the 2010 -11 reporting year 47% of finalised complaints were conciliated and where conciliation was attempted, 64% were successfully resolved.

Increase in the number of complaints received

The below table identifies levels of complaints and enquiries received by the Commission since 2005-06.

	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
Complaints received	1397	1779	2077	2253	2517	2152
Enquiries received	11336	16606	18765	20188	19968	18670

The Commission received additional funds in March 2005-06 and 2006-07 to handle an increase in complaints associated with WorkChoices. That funding was confirmed as ongoing from 2007-08. This funding was then withdrawn in the 2007-08 additional estimates under the subsequent government policy - "*A fairer workplace relations system – less bureaucracy*" on the basis that these matters would be dealt with through the fair work jurisdiction.

Despite this, the Commission has experienced a significant and sustained growth in complaints and enquiries over recent years. The number of complaints received increased by **80%** during the five year period from 2005-06 to 2009-10 and the number of enquiries received increased by **76%**.

The growth in enquiries and complaints received by the Commission has continued post the commencement of the *Fair Work Act 2009* on 1 July 2009. In the period 1 July 2009 – 30 June 2010, the Commission saw a 12% increase in complaints received in comparison with the previous year.

Employment has traditionally been a major area of complaint under all federal discrimination laws and this has continued in the past year. In the 2010-11 reporting year employment constituted:

- 88% of sex discrimination complaints
- 66% of age discrimination complaints
- 35% of race discrimination complaints
- 31% of disability discrimination complaints

Over the past six years the Commission has received an average of 2029 complaints per year. The complaint received figures for the current reporting year to date indicate that the Commission is almost certain to receive more than this amount of complaints this year.

In the first four months of this financial year the Commission has received a 22 % increase in complaints received compared to the same period in the last reporting year. There has also been a significant increase in complaints received alleging a breach of human rights in relation to the length or conditions of detention, as well as complaints that detention or visa decisions constitute an arbitrary interference with the family. In the first four months of this reporting year there has been a 111% increase in complaints made under the *Australian Human Rights Commission Act 1986* when compared with the same period in the previous reporting year.