The Senate

Legal and Constitutional Legislation Committee

Provisions of the Australian Human Rights Commission Legislation Bill 2003

May 2003

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* Senator Aden Ridgeway, AD, NSW to replace Senator Brian Greig for matters relating to the Indigenous Affairs portfolio

Participating Members*

*** Senators Kirk, Nettle and Stephens participated in public hearings and consideration of the Committee report for this inquiry**.

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Suite S1.61
Parliament House

Telephone: (02) 6277 3560
Fax: (02) 6277 5794
E-mail: legcon.sen@aph.gov.au

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RECOMMENDATIONS

Recommendation 1

The Committee recommends:

(a) that proposed subsection 8(1) of the Bill be amended to provide that each of the three Human Rights Commissioners have a designated area of responsibility such as:

- **human rights and disabilities;**
- **sex discrimination; and**
- **race discrimination and Aboriginal and Torres Strait Islander social justice;**

(b) that one of the Commissioners be required to have significant experience in community life of Aboriginal persons or Torres Strait Islanders, in the terms of subsection 46B(2) of the Act. Appropriate consequential amendments would also be required; and

(c) that provision could also be made to the effect that the designation of specific spheres of responsibility of each Commissioner does not limit his or her scope to develop specializations in other important areas of human rights.

The Committee recommends further that if paragraph (a) of this recommendation is not agreed to, paragraph (b) be agreed to.

Recommendation 1(a) is supported by Senators Payne and Mason. Senator Scullion supports the provisions of the Bill as drafted.

Recommendation 1(b) is supported by Senators Payne, Mason and Scullion.

Recommendation 1(c) is supported by Senators Payne and Mason.

Senators Bolkus, Ludwig and Greig support Recommendation 1 insofar as there should remain a statutory requirement that a Commissioner be required to have significant experience in community life of Aboriginal persons or Torres Strait Islanders, in the terms of existing subsection 46B(2) of the Act, but do not support the removal of the specialist Commissioners for reasons set out in their dissenting report.

Recommendation 2

The Committee recommends:

(a) that proposed subsections 11(5) and (6), subsections 31(2) and (3) and the equivalent provisions of the Bill amending the *Disability Discrimination Act 1992*[1], the *Racial Discrimination Act 1975*[2] and the *Sex Discrimination Act 1984*[3] concerning the requirement for the Commission to seek the Attorney-General's approval or to notify him or her of any proposed application to seek leave of a court to intervene not be agreed to;

(b) consideration be given to developing informal arrangements to improve communications between the Commission and the Attorney-General in order to alleviate potential difficulties in relation to intervention matters; and

(c) consideration be given to amending the Bill to require the Commission, in its annual report, to provide details of all legal proceedings in which the Commission has sought leave to intervene during the year.

Senator Scullion dissents from this recommendation.

Recommendation 3

Subject to amendments outlined in the previous recommendations, the Committee recommends that the Bill be agreed to.

Senator Scullion also recommends that the Bill be agreed to, subject to his reservation on Recommendation 1.

Senators Bolkus, Ludwig and Greig do not support this recommendation for reasons set out in their dissenting report.

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1 Proposed new subsections 67 (3) and (4), DDA.

2 Proposed subsections 20(2) and (3), RDA.

3 Proposed subsections 48(3) and (4), SDA.

ABBREVIATIONS

ACHRA	Australian Council of Human Rights Agencies
ACOSS	Australian Council of Social Service
DDA	*Disability Discrimination Act 1992*
Committee Report 1999	Senate Legal and Constitutional Legislation Committee *Inquiry into the provisions of the Human Rights Legislation Amendment Bill (No. 2) 1998*, (1999)
HREOCA	*Human Rights and Equal Opportunity Act 1986*
HREOC or Commission	Human Rights and Equal Opportunity Commission
HRLAA (No.1)	*Human Rights Legislation Amendment Act (No. 1) 1999*
NEDA	National Ethnic Disability Alliance
NTA	*Native Title Act 1993*
PIAC	Public Interest Advocacy Centre
proposed Commission	proposed Australian Human Rights Commission
RDA	*Racial Discrimination Act 1975*
SDA	*Sex Discrimination Act 1984*
the 1998 bill	Human Rights Legislation Amendment Bill (No. 2) 1998 (as introduced)
the 1999 bill	Human Rights Legislation Amendment Bill (No. 2) 1999

CHAPTER 1

INTRODUCTION

1.1 On 27 March 2003, the Senate referred the Australian Human Rights Commission Legislation Bill 2003 to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 29 May 2003.

Key aspects of the Bill

1.2 Principally, the Bill:

- changes the name of the Human Rights and Equal Opportunity Commission (HREOC) to the Australian Human Rights Commission and renames the *Human Rights and Equal Opportunity Act 1986* (HREOCA) as the *Australian Human Rights Commission Act 1986*;
- replaces HREOC's existing executive structure, comprising a President and five specialist Commissioners, with a new structure of a President and three generalist Human Rights Commissioners;
- requires the Attorney-General's consent before the Commission seeks leave to intervene in court proceedings, except where the President is, or was immediately before appointment, a federal judge (in which case the Attorney-General must be notified and given written reasons, a reasonable time before the application to court);
- makes education, information and assistance central functions, emphasises the development of guidelines to assist people to comply with their obligations under federal anti-discrimination legislation and requires the use of a new by-line;
- removes HREOC's power to recommend compensation or damages following certain inquiries;
- centralises with the President all complaint investigations and conciliation powers under the *Disability Discrimination Act 1992* (the DDA), the *Racial Discrimination Act 1975* (RDA) and the *Sex Discrimination Act 1984* (SDA);
- enables the Attorney-General to appoint part time Complaints Commissioners to whom the President may delegate complaint-handling functions; and
- repeals existing provisions for establishing a Community Relations Council and advisory committees.

1.3 Other minor and consequential amendments to the HREOCA and consequential amendments to the DDA, the RDA, the SDA and other legislation are also proposed.[1]

Background: the role of HREOC

1.4 The HREOC is a statutory authority comprising a President and five specialist Commissioners – the Human Rights Commissioner; the Race Discrimination Commissioner; the Sex Discrimination Commissioner; the Disability Discrimination Commissioner; and the Aboriginal and Torres Strait Islander Social Justice Commissioner.

1.5 The broad objective of HREOC is to promote respect for and observance of human rights in Australia:

> The Commission seeks to promote an understanding and acceptance of human rights in Australia; undertakes research to promote human rights; investigates and attempts to conciliate complaints about breaches of human rights or of equal opportunity laws; intervenes or acts as *amicus curiae* in important legal cases that may affect the human rights of people in Australia; examines laws related to human rights; and provides advice to government on laws and actions that are required to comply with international human rights obligations.[2]

1.6 The HREOC is primarily responsible for administering the Commonwealth's anti-discrimination regime as enacted in the HREOCA, the RDA, the SDA and the DDA. The *Native Title Act 1993* (NTA) confers additional functions on the Aboriginal and Torres Strait Islander Social Justice Commissioner. The HREOC is also responsible for overseeing Australia's obligations under seven key human rights instruments.[3]

Previous Bills

1.7 The provisions of the current Bill are very similar in major respects to two previous Bills introduced in 1998 and 1999.[4] The 1998 Bill was the subject of a report by the previous Senate Legal and Constitutional Legislation Committee in

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1 Legislation such as the *Crimes (Torture) Act 1988*, the *Defence Act 1903*, the *Workplace Relations Act 1996* and the *Federal Court of Australia Act 1976.*

2 HREOC *Annual Report 2001-2002*, Statement of the President, p. 7, HREOC 2002.

3 Human Rights Legislation Amendment Bill (No.2) 1999, *Bills Digest No. 146 1998-99*, Information and Research Services, Department of the Parliamentary Library 1999, pp. 2-3.

4 Human Rights Legislation Amendment Bill (No.2) 1998; the Human Rights Legislation Amendment Bill (No. 2) 1999. The 1999 Bill was very similar to the 1998 Bill, with some differences in relation to the intervention power, discussed further below.

1999.[5] Consequently key provisions in the Bill have been subject to close consideration on previous occasions.

1.8 The most substantial differences between the former bills (as introduced) and the current Bill are that the former bills provided for:

- the restructuring of the HREOC to replace the existing five specialist commissioners with three deputy presidents with specified areas of responsibility, whereas the current Bill provides for the restructured Commission to comprise three generalist Human Rights Commissioners; and

- the approval of the Attorney-General to be obtained where the Commission proposed to seek leave to intervene in court proceedings, whereas the current Bill distinguishes between situations where the President is or was a federal judge (in which case notification is required) and where the President is not (in which case approval is required).[6]

1.9 In addition, the current Bill:

- proposes a new title of the Australian Human Rights Commission, rather than the Human Rights and Responsibilities Commission formerly proposed;

- includes a requirement for the Commission to use a specific by-line;

- requires the Commissioners to consult each other before seeking to become an amicus curiae of the court in a particular case; and

- allows for the appointment by the Attorney-General of legally qualified part-time Complaints Commissioners.[7]

1.10 The differences between the current and previous Bills are explored in further detail in the relevant chapters.

Conduct of the inquiry

1.11 The Committee advertised the inquiry in *The Australian* newspaper on 9 April and 23 April 2003 and invited submissions by 24 April 2003. Details of the inquiry,

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5 Senate Legal and Constitutional Legislation Committee *Inquiry into the Human Rights Legislation Amendment Bill (No.2) 1998* (1999).

6 Key amendments to the 1999 (No.2) Bill moved by the Attorney-General at the Third Reading stage and adopted by the House of Representatives included replacement of the provisions requiring the Attorney-General's approval. The substituted provisions did not require approval, but instead notification to the Attorney-General of such an application and written reasons for it, a reasonable time before the court application was made. The 1998 Bill also removed the Privacy Commissioner from HREOC and established that office as a separate authority: separate legislation subsequently achieved that result.

7 For details of the earlier bills, see the Committee Report 1999, paras 1.1 -1.7.

the Bill and associated documents were placed on the Committee's website. The Committee also wrote to over 150 interested organisations and individuals. The Committee received 225 submissions (including 4 supplementary submissions) and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.12 The Committee held public hearings in Sydney on 29 April 2003 and Canberra on 14 May 2003. A list of witnesses who appeared at the hearings is at Appendix 2.

Scope of the report

1.13 Chapter 2 sets out the proposed restructuring of the Commission, considers the evidence presented to the Committee and sets out the Committee's conclusions and recommendations on the relevant issues.

1.14 Chapter 3 deals with the Bill's proposed requirements if the Commission intends to seek leave to intervene in court proceedings. The chapter refers to the evidence received by the Committee and sets out the Committee's conclusions and recommendations.

1.15 Chapter 4 outlines other significant provisions of the Bill, discusses the evidence given to the Committee and states the Committee's conclusions and recommendations.

1.16 The Committee has carefully considered the Bill and the written and oral evidence presented to it by a range of individuals and organisations during this inquiry. All Government Senators endorse this report as a fair and accurate record of the Committee's inquiry and, while there are some differences in views on particular issues as outlined in the recommendations, recommend that the Bill proceed, subject to such reservations as are outlined in those recommendations.

Acknowledgements

1.17 The Committee thanks those organisations and individuals who made submissions and gave evidence at public hearings. The volume, quality and range of the submissions were appreciated, particularly in light of the limited timeframe.

Note on references

1.18 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

1.19 Unless otherwise indicated, references to proposed sections are to sections of the proposed *Australian Human Rights Commission Act 1986.*

CHAPTER 2

STRUCTURE OF THE COMMISSION

2.1 This chapter discusses one of the issues that attracted most criticism during the inquiry, namely, the proposed changes to the structure of HREOC, including the replacement of the current five portfolio specific commissioners by three Human Rights Commissioners who, with the President 'will have a common responsibility to protect and promote human rights for all Australians'.[1]

Current structure of HREOC

2.2 Under the HREOCA, the Commission comprises the President and five designated positions of Commissioner: a Human Rights Commissioner; a Race Discrimination Commissioner; a Sex Discrimination Commissioner; a Disability Discrimination Commissioner; and an Aboriginal and Torres Strait Islander Social Justice Commissioner, each of whom is appointed by the Governor-General.

2.3 There has been only one permanent Disability Discrimination Commissioner. Since her term expired in December 1997, the Human Rights Commissioner has acted as the Disability Discrimination Commissioner for all but a short period of time when the Sex Discrimination Commissioner acted in the position. Since the term of the last Race Discrimination Commissioner expired in September 1999, the Aboriginal and Torres Strait Islander Social Justice Commissioner has acted in that position.[2] In practice, then, there are only three Commissioners who are responsible for the five positions.

The provisions of the Bill

2.4 Proposed subsection 8(1) states that the Commission is to consist of a President and three Human Rights Commissioners.

2.5 Proposed subsection 8B(3) requires that, before the Governor-General appoints a person under that subsection, the Minister must be satisfied that the President, the other Human Rights Commissioners and the person, as a group, 'have expertise in the variety of matters likely to come before the Commission'. Section 46B of the HREOCA, which establishes the position of Aboriginal and Torres Strait Islander Social Justice Commissioner, is to be repealed, thus removing the specific requirement in subsection (2) that:

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1 The Hon. Daryl Williams AC MP, Attorney-General, Australian Human Rights Commission Legislation Bill 2003, Second Reading Speech, *House of Representatives Hansard*, 27 March 2003, pp. 13766-67.

2 HREOC, *Submission 103*, pp. 12-13.

> A person is not qualified to be appointed unless the Governor-General is satisfied that the person has significant experience in community life of Aboriginal persons or Torres Strait Islanders.

2.6 The Government's stated reasons for the restructuring are:

- as the President and the Commissioners will, as a group, have expertise covering the variety of matters coming before the Commission, the new collegiate structure will give the Commission greater flexibility to deal with current human rights issues which cut across the boundaries of the existing specialisations (such as women with disabilities);

- new areas of Commission responsibility, such as age discrimination, may emerge, and these will also be able to be dealt with without the need to appoint new specialist commissioners as each new area develops; and

- account should be taken of the social and economic environment facing all levels of government and business.[3]

Comparison with the previous Bills

2.7 Under the 1998 and 1999 Bills the proposed restructure was somewhat different. The Commission was to comprise the President and three Deputy Presidents, each with specific grouped areas of responsibility set out in the proposed legislation. These responsibilities were:

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

2.8 The Explanatory Memorandum in relation to the 1998 Bill stated:

> The designation of spheres of responsibility for each Deputy President in the new Commission is not intended to limit the ability of those Deputy Presidents to develop specialisations in other important areas of human rights, for example, children's rights, age discrimination or other issues.[4]

Evidence to the Committee

2.9 Most submissions, including the submission by the HREOC,[5]were opposed to the proposed replacement of the five specialist commissioners with three generalist commissioners.

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3 See Attorney General's Second Reading speech and Explanatory Memorandum p. 6 paras 19-20.

4 Explanatory Memorandum, Human Rights Legislation Amendment Bill (No. 2) 1998, p. 6.

5 *Submission 103*, pp. 13-16.

2.10 On behalf of Professor Tay, the President of HREOC, Commissioner Dr Jonas told the Committee that the Commission had 'serious reservations' about the proposal:

> Specialist Commissioners with specialist expertise have so far been successful in tackling serious human rights issues in Australia and are respected as officers with extensive knowledge and experience in socially complex issues. Changes can only bring confusion over roles and leave disadvantaged groups without an identified advocate.[6]

2.11 The main concerns discussed in more detail below may be summarized as:

- the specialist commissioners have a strong record of advocacy, educational and policy activities;
- the specialized commissioner positions are well known to and accepted by their constituencies and many members of the general public. Their removal is likely to lead to confusion and possibly antipathy among disadvantaged communities who have had contact with, or are aware of the work of, these commissioners;
- replacement of the specialized positions, which have a quite high public profile, with generalist ones would be likely to have a negative effect on the Commission's educational role;
- there is significant concern about removing the express requirement for a Commissioner to be responsible for Indigenous issues, and the statutory requirement that the Aboriginal and Torres Strait Islander Social Justice Commissioner have experience in the community life of Aboriginal people or Torres Strait Islanders;
- the present composition of the Commission better meets the requirements of the *Paris Principles*[7] than would the proposed restructured generalist Commission; and
- the Commission already has the flexibility to deal with issues involving human rights issues that cut across the boundaries of existing specializations and of emerging human rights areas such as age discrimination.

Specialist compared with generalist Commissioners

2.12 The Australian Council of Social Service (ACOSS) submitted that specialist Commissioners positions were important for a number of reasons:

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6 *Committee Hansard*, 29 April 2003, p. 3.

7 The Paris Principles – *Principles relating to the status of national institutions – competence and responsibilities: Composition and guarantees of independence and pluralism,* are set out in Appendix 4 and discussed on pp. 13-14.

> They reflect the real and all too common characteristics of human rights infringements – often based on discrimination associated with sex, race indigenousness and disability.
>
> Specialist Commissioners provide a public point of identification not only for individuals and for communities of interest such as population-specific community organizations, academics and researchers, specialist lawyers etc. Over time specific laws have been enacted relating to these areas of discrimination. …
>
> Given the continuing role of the Commission in hearing complaints the establishment of relationships between specialist commissioners and relevant community groups are important. Many complainants need the support of such a group to proceed with a complaint and to cope with the stress, uncertainty and complexity that such actions engender.[8]

2.13 Speaking on behalf of the Women's Electoral Lobby (WEL) and the Women's Economic Think Tank (WETTANK)[9], Ms Eva Cox described the 'individual identities' of the specific commissioners as 'incredibly important':

> I think all of the existing and past sex discrimination commissioners have done very well in representing their constituencies and in being seen to represent their constituencies. I think it has been very important that you have the Indigenous social justice commissioner there because that is somebody that people feel they can talk to. If you have generalist commissioners, who do you talk to?

2.14 Ms Cox expressed concern about the selection of the proposed generalist Commissioners:

> I pointed out in the WETTANK submission that it is also extraordinarily difficult to make sure that the Attorney-General—not the Governor-General this time—is 'satisfied that the people appointed are going to have the expertise'. How do you actually do that when you have three generalists? Does every generalist have to cover every area? If the one that has the particular expertise in a particular area falls out, do you then have to appoint somebody with exactly the same skills the next time around to fill that particular gap?
>
> There are actually some strong administrative problems, as well as some problems about how you are seen in the community, in trying to maintain that you have three people who have five or six or seven or eight particular areas of expertise and trying not to shuffle them. You would end up with de

8 *Submission 94*, p. 3.

9 A number of organizations including the Young Women's Christian Association (YWCA), the Australian Federation of University Women, and other non-government organizations endorsed the submission of WETTANK (see *Submission 83*).

> facto portfolio commissioners but ones that do not have the legitimacy of the existing ones, and I cannot see what the point is.[10]

2.15 The Australian Council of Human Rights Agencies (ACHRA), which comprises the Commissioners/Presidents of the State and Territory equal opportunity and anti-discrimination agencies, expressed its belief that:

> … the case for replacing the specialist portfolio Commissioners with three Human Rights Commissioners has not been made out…
>
> ACHRA is not convinced that the only means of dealing with the demands of overlapping issues is by changing the governance structure as proposed. Overlapping issues, such as the needs of women with disabilities, are of course important, but ACHRA does not consider that responses to these demands need be pursued at the expense of specialist expertise.[11]

Aboriginal and Torres Strait Islander Social Justice Commissioner

2.16 Particularly strong views were expressed in support of the retention the Aboriginal and Torres Strait Islander Social Justice Commissioner. One example was former Royal Commissioner into Aboriginal Deaths in Custody and former Deputy President of the National Native Title Tribunal, the Hon Hal Wootten AC QC, who argued:

> The point is not … that the existence of an Aboriginal Social Justice Commissioner is a solution to [the problems affecting Aboriginal and Torres Strait Islander people] but that the present is no time to be abolishing the only independent, specialised and informed source dedicated to keeping the issues before Government and the public and pressing for appropriate attention. … Many of the problems affecting the Aboriginal community are very difficult to resolve, and the last thing Australia should be doing is sweeping them under the carpet, which can all too easily happen as non-specialists are distracted by more general and more easily solved problems.[12]

2.17 Similar views were expressed by many Aboriginal organisations, legal and church-based bodies, academics, civil liberties groups, statutory authorities and individuals, Aboriginal and non-Aboriginal, numbers of whom expressed appreciation of the work of the two successive Aboriginal and Torres Strait Islander Commissioners.[13] HREOC and ACHRA expressed similar views. Each was firmly of

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10 *Committee Hansard*, 29 April 2003, pp. 34 -35.

11 *Submission 130*, p. 4.

12 *Submission 72*, p. 3.

13 See, for example, Ethnic Communities' Council of NSW Inc *Submission 70*; Catholic Commission for Justice Development and Peace (Melbourne) *Submission 117.*

the belief, for similar reasons, that it is inappropriate to abolish the role of the Aboriginal and Torres Strait Islander Social Justice Commissioner.[14]

2.18 In evidence to the Committee, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Jonas, distinguished the functions of that position from those of other Commissioners:

> There is recognition in the legislation of the importance that the person exercising the functions of the commissioner be experienced in the community life of Aboriginal and Torres Strait Islander peoples … [T]he legislation confers the functions individually on the commissioner rather than on the commission as a whole. It is notable, as all other functions of the commission, such as those of the race discrimination or sex discrimination commissioners, are conferred on the commission and performed by the relevant commissioner on its behalf.
>
> This distinction is crucial, as it means that the function to produce an annual report on the status of enjoyment of human rights by Indigenous people, the Social Justice report, and the similar report on the impact of the Native Title Act on the enjoyment of Indigenous human rights, is to be prepared by someone with experience in the livelihood of Indigenous peoples.[15]

2.19 The ACHRA submitted that it was 'difficult to understand' why the requirement of experience in Indigenous community life was to be removed:

> Until the position of indigenous people in Australia has markedly improved, it is unreasonable to suggest that a general Human Rights Commissioner would be adequately aware of the issues and have the required specialist knowledge and experience of indigenous issues to protect effectively the human rights of Aboriginal people and Torres Strait Islanders.[16]

Other specialist commissioner portfolios

2.20 Many submissions also expressed particular concern about losing the specialist portfolio commissioners with other areas of responsibility.

2.21 The Catholic Commission for Justice, Development and Peace (Melbourne) said:

> Thematic Commissioners have been outstanding in their role in community education … Individuals strongly identified with particular areas of fighting discrimination are required with specific portfolios to allow them to speak with authority. The thematic Commissioners perform an invaluable role in helping the community to understand that discrimination does occur in our society, that discrimination occurs in particular areas where certain groups

14 *Committee Hansard*, 29 April 2003, pp. 4-5; ACHRA *Submission 130*, pp. 4-5.

15 *Committee Hansard,* 29 April 2003, p. 4.

16 *Submission 130*, p. 5.

> are particularly affected: Aborigines, women, people of different race and ethnic background.
>
> The loss of the thematic commissioners, to be replaced by generalist commissioners, runs counter to the intent of the Bill which is to assist the Commission in its community education role. The proposal seems to serve no other purpose than to remove high profile and successful advocacy in the areas of race, indigenous affairs and so on where thematic commissioners lead the debate.[17]

Human rights issues across specialist boundaries

2.22 As to the approach that the generalist Human Rights Commissioners would better handle human rights issues across specialist areas, Ms Sue-Anne Lind, National Director, National Ethnic Disability Alliance, told the Committee:

> Both the ethnic and disability sectors have been successful in their attempts to ensure that a race discrimination commissioner and a disability discrimination commissioner exist. These commissioners have the necessary expertise in their separate portfolio areas to manage the complexity of direct, indirect and systemic discrimination against people from an NESB (non-English-speaking background) with disability. We fail to see how the establishment of three non-specific commissioners will enhance or protect the human rights of people from an NESB. This leads us to our second recommendation—that the Senate reject the proposal to remove the current specialist commissioners who have the necessary knowledge within their portfolio areas to deal with the complex issues of discrimination relating to ethnicity and disability and their interrelationship as well.[18]

2.23 The HREOC submitted that its present structure does not restrict it from having a flexible approach to dealing with a broad range of human rights issues:

> The Commission's current structure does not prevent the Commission from dealing with topics that raise broad or intersecting human rights issues in a flexible and informed manner. For example, the Commission's public inquiry into Children in Immigration Detention has touched upon issues relating to children with disabilities and issues relating to young girls and young women in detention. Similarly, the Commission's 2000 report into access to electronic commerce dealt with issues of age and disability while the Commission's report, 'Age Matters' in June 2000 focused on age discrimination.[19]

2.24 Ms Robynne Quiggin on behalf of the Jumbunna House of Learning said in evidence:

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17 Catholic Commission for Justice, Development and Peace, (Melbourne) *Submission 117*, p. 7.

18 *Committee Hansard*, 29 April 2003, p. 39.

19 *Submission 103*, pp. 15-16.

> I do not think there is such a thing as, perhaps, a completely secure safety net for all rights of all people. There will always be people whose rights may fall between the gaps. Human rights is an evolving area. In my experience, the units within the commission work actively together to attempt to—if I can use the expression—plug those gaps. My recent experience was participating in the work of the commission on the rights of Aboriginal women who are incarcerated. Both the Aboriginal and Torres Strait Islander Social Justice Commission and the Sex Discrimination Unit worked closely together to develop ways of understanding the experience of Indigenous women, given that the rates of incarceration for Indigenous women are currently rising. So my experience in the commission is that there is a great capacity to work across units and, in that sense, have a collegiate response to issues, and to sew the net tighter so that less people fall through the gaps.[20]

2.25 The ACHRA said that it was 'not convinced' that the proposed provisions to change the governance structure was 'the only means of dealing with the demands of overlapping issues':

> Overlapping issues, such as the needs of women with disabilities, are of course important, but ACHRA does not consider that responses to these demands need be pursued at the expense of specialist expertise.[21]

Educational function

2.26 In his evidence to the Committee, Mr Ian Lacey, Executive Member, Ethnic Communities Council of New South Wales, said that the Council strongly supported the provision that education, information and assistance to the public should be central functions of the Commission (discussed further in Chapter 4). However, he added that one of the Council's fundamental submissions was:

> … that those educative and information functions are best performed by a specialised commissioner, in the particular area of community harmony and probably in other areas as well, and we think that there should be a specialised race discrimination commissioner. Our experience is that it needs a dedicated personality to provide a public face for the national commitment to eliminate discrimination and vilification from our society. We also think that it is important that the message that racism will not be tolerated in Australia should not be diluted by changes in the structure of the commission. We think that the proposal to share the various commissioners' functions between a group of four, in a collegiate structure, does detract from that message.[22]

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20 *Committee Hansard,* 29 April 2003, p. 51.

21 *Submission 130*, p. 4.

22 *Committee Hansard,* 29 April 2003, p. 52.

The 'Paris Principles'

2.27 From the submissions and the evidence given at the Committee's hearing in Sydney it was apparent that there was a considerable desire among those responding that the specialist positions should be preserved. The New South Wales Council for Civil Liberties and the University New South Wales Council for Civil Liberties jointly submitted that:

> … the abolition of the specialist Commissioners could have the effect of weakening the pluralist representation on the Commission. Pluralist representation in the composition of national human rights institutions is recommended by the *Paris Principles*.[23]

2.28 These Principles[24] (reproduced in Appendix 4) were adopted at a United Nations-sponsored meeting of representatives of National Human Rights Institutions held in Paris, in 1991, and later endorsed by the United Nations Commission on Human Rights[25] and the United Nations General Assembly.[26] They were described as having become 'the foundation and reference point of the establishment and operation of national human rights institutions.'[27]

2.29 Australia, as a full member of the Asia Pacific Forum of National Human Rights Institutions, is committed to complying with the minimum standards set out in the *Paris Principles*.[28] Principle 1 concerns the composition of such national institutions.

> The composition of the national institution and the appointment of its members, --- shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights ...

2.30 The Human Rights Council of Australia, whilst referring to the Paris Principles in this context, acknowledged that the positions of the specialist commissioners established under the HREOCA are unique among human rights institutions around the world. However, the Council argued that the explicit pluralist composition of the Commission is consistent with Australia's position as a country which has in the past taken a leading role in contributing to the development of the

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23 *Submission 81,* p. 13.

24 *Principles relating to the status of national institutions.*

25 Resolution 1992/54 of 3 March 1992.

26 Resolution 48/134 of 20 December 1993, annex.

27 Women's Economic Think Tank (WETTANK) *Submission 83*, p.7.

28 *Constitution* of the Asia Pacific Forum of National Human Rights Institutions *'A partnership for Human Rights in the Region',* s. 11.1, cited by Amnesty International *Submission 142A*, p. 5.

Paris Principles and promoting the establishment of independent human rights institutions throughout the world and particularly in Australia's region.[29]

Alternative suggestions

2.31 In their submissions and evidence, the representatives of the NSW Councils for Civil Liberties supported the structural model in the 1998 Bill:[30]

> In that model the proposal was to reduce the number of commissioners to three, each with grouped responsibilities. The three proposed (Deputy President) positions to be established by that Bill were to be respectively responsible for :
>
> - social justice and race;
> - sex discrimination and equal opportunity; and
> - human rights and disability.[31]

2.32 The Councils submitted that the change to three commissioners having these or similar subject designations is preferable to the three generalist Human Rights Commissioners in the current Bill.[32]

2.33 Finally, several submissions proposed that what is needed for the Commission to meet more effectively its responsibilities in relation to all forms of discrimination and breaches of human rights is more resources, rather than the proposed restructure.[33]

Conclusions

2.34 It is clear from the submissions to the Committee from a wide range of organisations and individuals that there is strong support for retaining the concept of specialist commissioners rather than replacing them with generalist human rights commissioners. The easily identifiable titles and high profile advocacy, in-depth knowledge, experience and skills of the specialist HREOC commissioners over the years, and the fact that they have developed strong links with relevant community and other specialist organisations, are seen as important in maintaining the awareness and trust of those who look to the support and advocacy of the Commission in relation to human rights issues that affect them.

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29 *Submission 23*, pp. 3 & 6. See also on Australia's role, the Hon Elizabeth Evatt AC, *Submission 138,* pp. 1-2.

30 See item 11 of the 1998 bill (proposed subsection 8(1)).

31 NSW Council for Civil Liberties and University of NSW Council for Civil Liberties, *Submission 81,* pp. 13-14.

32 ibid.

33 For example, Anti-Discrimination Commission Queensland *Submission 118A*, p. 4; Executive Council of Australian Jewry, *Submission 44*.

2.35 The Committee notes that there have been in fact only three specialist Commissioners in office since September 1999, with two Commissioners, the Human Rights Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner, acting as Disability Discrimination Commissioner and Race Discrimination Commissioner respectively. The community appears to have adapted to this arrangement, which seems to operate effectively.

2.36 The Committee notes the Government's expressed concern to ensure that the Commission has greater flexibility to deal with current human rights issues which cut across the boundaries of the existing specializations, as well as emerging areas of discrimination, without the need to appoint new specialist commissioners. Both the objectives of the Government and the wishes of the many organizations that made submissions on this issue could be met, to a substantial extent, if a similar approach were taken to that proposed in the 1998 Bill, with some modifications.

2.37 This would involve amending the Bill to provide for each of the proposed areas of specific responsibility similar to those specified in the 1998 Bill. If considered necessary, provision could be made to the effect that the designation of spheres of responsibility does not limit the scope for the commissioners to develop specializations in other important areas of human rights.

2.38 This conclusion is similar to that of the previous Committee which inquired into the 1998 bill. That conclusion was that neither the collegiate responsibility of the then proposed three deputy presidents[34] (offices similar to those of the commissioners, under the Bill) nor the designation of spheres of responsibility for each of these office-holders set out in the 1998 bill was likely to limit his or her ability to develop specialization in other important areas of human rights, for example, children's rights, age discrimination, or other issues.[35] Further, there is a significant advantage, in relation to the educative role of the Commission, in having Commissioners who have publicly identifiable roles.

2.39 As to the question of whether the sphere of 'equal opportunity' should be added to that of 'sex discrimination,' this concept applies to all areas of discrimination and therefore should not be specified as a specific area of responsibility of the Commissioner responsible for sex discrimination.[36]

2.40 As to the proposed repeal of the specific provisions of the Act requiring the Governor-General to be satisfied that a person to be appointed as Aboriginal and Torres Strait Islander Social Justice Commissioner has significant experience in the community life of Aboriginal persons and Torres Strait Islanders,[37] the Committee

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34 A Deputy President responsible for social justice and race; a Deputy President responsible for sex discrimination and equal opportunity, and a Deputy President responsible for human rights and disability.

35 Committee Report 1999, p. 13.

36 See HREOC *Submission 11* to the Committee Report 1999, pp. 9-10.

37 HREOCA section 46B.

considers that the Bill should be amended to require that one of the Human Rights Commissioners is so qualified. The Committee is satisfied, from the submissions, that there is broad support for this. The functions that the Commission itself is given under the Bill, in relation to issues of Aboriginal and Torres Strait Islander social justice, are different from those of all other existing specialist commissioners and of the existing Commission. Key aspects of these functions include reporting annually on the status of enjoyment of human rights of Indigenous people - the Social Justice Report - and the similar report on the impact of the Native Title Act on the enjoyment of Indigenous human rights.[38] These reports should be prepared by someone with experience in the livelihood of Indigenous peoples.

Recommendation 1

The Committee recommends:

(a) that proposed subsection 8(1) of the Bill be amended to provide that each of the three Human Rights Commissioners have a designated area of responsibility such as:

- **human rights and disabilities;**
- **sex discrimination; and**
- **race discrimination and Aboriginal and Torres Strait Islander social justice;**

(b) that one of the Commissioners be required to have significant experience in community life of Aboriginal persons or Torres Strait Islanders, in the terms of subsection 46B(2) of the Act. Appropriate consequential amendments would also be required; and

(c) that provision could also be made to the effect that the designation of specific spheres of responsibility of each Commissioner does not limit his or her scope to develop specializations in other important areas of human rights.

The Committee recommends further that if paragraph (a) of this recommendation is not agreed to, paragraph (b) be agreed to.

Recommendation 1(a) is supported by Senators Payne and Mason. Senator Scullion supports the provisions of the Bill as drafted.

Recommendation 1(b) is supported by Senators Payne, Mason and Scullion.

Recommendation 1(c) is supported by Senators Payne and Mason.

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38 *Committee Hansard*, 29 April 2003, p. 4.

Senators Bolkus, Ludwig and Greig support Recommendation 1 insofar as there should remain a statutory requirement that a Commissioner be required to have significant experience in community life of Aboriginal persons or Torres Strait Islanders, in the terms of existing subsection 46B(2) of the Act, but do not support the removal of the specialist Commissioners for reasons set out in their dissenting report.

CHAPTER 3

INTERVENTION IN COURT PROCEEDINGS

3.1 This chapter discusses the second of the main issues which raised much concern in submissions and during public hearings, namely, the Commission's power to seek leave to intervene in court proceedings.

The provisions in the Bill

3.2 One of HREOC's current functions, under section 11(1)(o) of the HREOCA, is to seek leave to intervene in court proceedings that involve human rights issues, where the Commission considers it appropriate to do so.[1] HREOC has a similar function under section 31(j) concerning proceedings involving equal opportunity discrimination issues, and under the RDA[2], the SDA[3] and the DDA[4] in relation to issues of race, sex, marital status, pregnancy and disability discrimination.

3.3 Proposed subsections 11(5) and 31(2) and equivalent provisions under the DDA, the RDA and the SDA, make the exercise of the intervention function conditional on:

- the Attorney-General first having given approval; or
- where the President is, or was immediately before his or her appointment, a federal Judge, the Commission notifying the Attorney-General of its intention to seek leave to intervene in court proceedings and its reasons for doing so.[5] The notice must be given when there is still 'a reasonable period' before the Commission seeks leave to intervene.

3.4 The Explanatory Memorandum explains the reason for this proposed change:

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1 Generally, in an intervention, a person or organisation seeks leave of a court to intervene as a party in proceedings, to protect his or her interests where they are different from those of the existing parties (see Federal Court Rules, Order 6 rule 8). Once given leave to intervene an intervener becomes a party to the proceedings and can give evidence, make submissions, seek and be liable for costs, and appeal. The Commission, however, seeks in interventions to assist the court by giving evidence and making submissions in relation to key human rights or discrimination issues in the proceedings where those issues are not being addressed by the parties to the proceedings. It follows published guidelines in doing so - see HREOC *Annual Report 2001-2002*, p. 85.

2 RDA paragraph 20 (1) (e).

3 SDA paragraph 48(1)(gb).

4 DDA paragraph 67(1) (l).

5 Under proposed subsections 11(6) and 31(3) and equivalent provisions of the other three Acts.

> As First Law Officer of the Commonwealth the Attorney-General has a general public interest role in litigation, including human rights litigation. When the new Commission is given leave to intervene in court proceedings, it will effectively become a party to those proceedings, advocating and/or defending a particular legal position, or a particular interpretation of any legislation in issue in the proceedings. Requiring the new Commission to seek the Attorney-General's approval for such an intervention before the new Commission exercises its function to seek leave to intervene will ensure that the intervention function is only exercised after the broader interests of the community have been taken into account.[6]

3.5 In deciding whether to approve the exercise of the Commission's power to seek leave to intervene, the Attorney-General may (but is not required to) have regard to a range of matters set out in proposed subsection (5) and its equivalent in the other proposed new provisions. The Explanatory Memorandum notes that the list 'is not in any way intended to limit the range of matters to which the Attorney-General may have regard'.[7] The relevant matters are:

- whether there has been an intervention in the proceedings by or on behalf of the Commonwealth;
- whether, in the Attorney-General's opinion, the proceedings may affect to a significant extent the human rights of, or involve to a significant extent issues of discrimination against, persons who are not parties to the proceedings;
- whether, in the Attorney-General's opinion, the proceedings have significant implications for the administration of the Act, the DDA, the RDA or the SDA; and
- whether, in the Attorney-General's opinion, there are 'special circumstances such that it would be in the public interest for the new Commission to intervene'.

3.6 The Explanatory Memorandum also states that the requirement to notify, but not seek the Attorney-General's formal approval of, the Commission's intention and its reasons for seeking leave to intervene in court proceedings when the President is or was a federal Judge 'ensures that there are no constitutional issues arising from the appointment of a federal Judge as President'.[8]

3.7 Similar amendments are proposed in the Bill in relation to the Commission's role in relation to equal employment discrimination issues under the Act[9] and discrimination issues under the DDA, the RDA and the SDA.[10]

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6 Explanatory Memorandum, p. 9.

7 ibid.

8 ibid.

9 Proposed subsections 31(2) and (3).

10 Explanatory Memorandum, pp. 22, 27 and 32.

3.8 The Commission's function under the HREOCA to assist in proceedings as *amicus curiae*[11] with leave of the court remains, but under the Bill, Commissioners must consult each other before seeking to become an amicus.

Comparison with the previous Bills

3.9 Under the 1998 and 1999 bills (as introduced), the Attorney-General's approval was to be required before the Commission could intervene in any court proceedings involving human rights or discrimination issues. There were four specified matters to which the Attorney-General might have regard in exercising his discretion. These were in substance the same as those set out in the current Bill.

3.10 At the Third Reading of the 1999 Bill in the House of Representatives, the Attorney General moved an amendment which required prior written notification (rather than approval) of the Attorney-General for the Commission to seek court leave to intervene. The amendment required notice to be given 'at a time when there is still a reasonable period before the intervention is to take place'[12] (that is, the same formulation as in the current Bill where the President is or was a federal judge).[13]

3.11 Thus the proposed provisions differ from those of both the 1998 and 1999 Bills (as introduced) and the amendment to the 1999 Bill subsequently passed by the House of Representatives.

3.12 The previous Committee decided that the intervention power should remain free of the need for the Attorney-General's approval, adding that more effective communications systems between the Commission and the Attorney-General may avoid any difficulties.[14]

Evidence to the Committee

3.13 The HREOC and almost all of the non-Commonwealth government organisations and individuals who addressed the issue were opposed to the proposal.

3.14 Some submissions were concerned with the different approach adopted in the Bill where the Commission is headed by a judicial President. However, most

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11 Section 46PV of the HREOCA provides that specialist Commissioners may, with the permission of the Federal Court or Federal Magistrates Service, seek to appear as *amicus curiae* (or friend of the court) in the hearings of complaints that have been terminated by the President. The role of an *amicus curiae* differs from that of an intervener in that the amicus is not a party to the proceedings, whereas an intervener becomes a party and becomes liable for any costs that the court may order. In 2001-2002 one matter was completed in which the Sex Discrimination Commissioner was *amicus curiae*, namely, *Fernely v Boxing Authority of NSW and State of NSW*.

12 *House of Representatives Hansard,* 13 October 1999, pp. 11433-36.

13 The Bill was not introduced into the Senate.

14 Committee Report 1999, p. 10.

opposition focused on the requirement for the Attorney-General's approval of a proposed intervention where the President is not a federal judge.

3.15 The two proposed situations are discussed separately below.

'Non-judicial' President – requirement of Attorney-General's approval

3.16 The main reasons advanced for opposing the approval requirement (further details of which are provided below) were:

- it is inappropriate for the court's role in deciding who may intervene to be diminished in relation to the Commission, Australia's principal human rights body, particularly when other potential interveners, including other Commonwealth statutory authorities, face no such restriction;

- the Commission's power to seek leave to intervene has been exercised responsibly, in accordance with its published guidelines – in no case has an application for leave been rejected by a court;

- it would adversely affect the independence of the Commission from the executive government, such independence being central to its capacity to perform and be seen to perform its functions effectively;

- it is inappropriate for a body likely to be a party to proceedings to control the access to the court of another potential party;

- the proposal is likely to give rise to conflicts of interest for the Attorney-General – in almost half of the cases in which the Commission has intervened the Commonwealth, as a party, has argued an opposing or different view;

- the amendments would weaken the Commission's capacity to defend human rights principles;

- the Commission's interventions have not involved duplication or the waste of resources;

- in a number of cases the Commission's intervention has been welcomed by the court as providing relevant material and arguments that may not otherwise have been raised;

- the Attorney-General is not the only arbiter of the 'broader interests of the community'. In human rights litigation, which generally challenges government decisions, policies and actions, the broader community interests may best be served by the Commission independently putting forward evidence and submissions concerning human rights principles;

- fettering the Commission's intervention power arguably would be incompatible with the *Paris Principles* and international best practice, adversely affecting Australia's international standing in the sphere of human rights protection;

- restricting the Commissions' intervention power would diminish an important component of the Commission's educative role;

- although the proposal sets out several matters to which the Attorney-General may have regard, these are not exhaustive and can be ignored thus restricting accountability;

- the exercise of the Attorney-General's discretionary power is not reviewable; and

- given that sometimes there is little time for the Commission to decide whether or not to seek to intervene, a requirement to seek the Attorney-General's approval would make more cumbersome the Commission's task of taking appropriate action to seek leave of the court in a timely way.

Interference with the court process

3.17 In a joint submission, Professor George Williams and Ms Ronnit Redman, of the Gilbert and Tobin Centre of Public Law, University of New South Wales; said:

> First, the proposal is an inappropriate interference with the judicial process. The Commission is able to intervene where this is of assistance to a court in deciding the matter before it. The decision of whether to allow an intervention by the Commission should be for the court and not a member of any government. We understand that the Commission has intervened to date in 35 matters (Commission Media Release, 27 March 2003). This suggests that the current intervention power of the Commission has been used cautiously and appropriately. We are not aware of any judicial comments to the contrary.
>
> 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)[15].

3.18 Several submissions drew attention to the Attorney-General's statement, in the context of their views of his decision not to defend the courts and judges from attack, that his office should be seen as being that of a member of the executive government. It was argued that the Attorney-General's office is now essentially a

15 *Submission 9*, p. 2.

'political' one and therefore it was inappropriate for him to have the role of filtering proposed submissions by the HREOC to a court.[16]

3.19 The Law Institute of Victoria submitted:

> … it is the role of the Court, in considering whether to grant leave to intervene, to determine whether the Commission has a role to play in proceedings before it or whether it would be a waste of the Court's time or a duplication to allow such an intervention ... It is not the role of the Attorney-General to function as "gatekeeper" for this decision, given that he or she is a member of the government and a member of a political party who may arguably be compromised in his or her ability to make an independent determination in relation to a proposed intervention.
>
> Whether the Court would be assisted by expert evidence of the Commission in particular cases involving issues of race, sex, and disability discrimination, human rights issues and equal opportunity in employment, is a matter for the Court to determine, and should be limited only by the Court's assessment of whether such assistance is desirable in each particular instance.[17]

3.20 Liberty Victoria (the Victorian Council of Civil Liberties) expressed similar views:

> For the Attorney-General to determine whether the Commission can intervene comes perilously close to interference with the judicial process.[18]

Use of the intervention power to date

3.21 In her statement to the Committee, the President of HREOC, Professor Tay, described the proposed restriction on intervention as the 'foremost of the Commission's concerns and the one which has the greatest potential to undermine fundamental human rights in Australia'. She said of the Commission's power to apply to a court for leave to intervene:

> It is a power used wisely, judiciously and sparingly. Since the commission was established in 1986 it has been granted permission to intervene in 35 court cases. It has never had an application to intervene rejected by the court.

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16 See for example, *Submission* 9, p. 2, and People with a Disability Australia Inc. *Submission 151*, p. 17, which cited the statement of the Attorney-General (before his appointment) '…[T]here is little or no expectation on the part of the public that the Attorney will act independently of his or her cabinet colleagues…it ought to be concluded that the perception that the attorney-general exercises important functions independently of politics and in the public interest is either erroneous or at least eroded', from *Who speaks for the Courts?* presented by the then Mr Daryl Williams QC, at the Courts in a Representative Democracy Conference, September 1995, at p. 8, and quoted in the Committee Report 1999, p. 7.

17 Law Institute of Victoria *Submission 158A*, p. 2.

18 *Submission 112*, p. 2.

> The right to seek leave to intervene is not a right taken lightly or used recklessly. Decisions are made by the commission after careful deliberation.
>
> Interventions are used to ensure human rights arguments that might not otherwise find voice in court cases are able to be argued and for the commission to assist judges by elaborating on points of international and domestic human rights law. As intervener, the commission provides specialist advice and experience and is independent of the parties to the case.[19]

3.22 Professor Tay's statement went on:

> The Commission has detailed guidelines for interventions. The case must involve significant issues of human rights or discrimination that are not peripheral to proceedings. The Commission will intervene if no other party is making the same arguments or if those arguments are unlikely to be adequately or fully advanced.[20]

3.23 The Commission's Guidelines, reproduced in Appendix 3, provide for notification of the Attorney-General's Office and of the Human Rights Branch of the Attorney-General's Department of each Commission decision to seek to intervene, and the reasons, 'as soon as practicable after the Commission has decided to apply to intervene in proceedings'.[21]

3.24 In its submission HREOC also noted that in the years since its inception, it has made 35 applications for leave to intervene, in none of which has it been refused leave to intervene.[22]

3.25 A representative of the Attorney-General's Department told the Committee of the Attorney-General's concerns:

> The Attorney has said publicly that he is certainly not arguing that the use of the interventions function has never been useful … He certainly is not suggesting that on all occasions where it has been used that it has been used inappropriately. Nevertheless he has said publicly that there have been occasions when he considers it has been used inappropriately and where HREOC has intervened unnecessarily in court proceedings.
>
> Recently, in a media interview[23], the Attorney referred to the case of *B & B* and indicated that he thought the intervention by HREOC on that occasion was inappropriate. *B & B* was in 1997.[24]…

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19 *Committee Hansard*, 29 April 2003, p. 2.

20 Guideline 5.

21 Guideline 7.

22 HREOC *Submission 103*, p. 4.

23 On *Life Matters*, ABC Radio National, 9 May 2003.

24 *Committee Hansard,* 14 May 2003, p. 71. (See *B v B* (1997) FLC 92-755).

> The Attorney-General felt that the intervention had been contrary to the broader public interest. In that case the commission's submissions related primarily to supporting the rights of a child's mother in her application to relocate as opposed to arguments based on the best interests of the child, which is the core principle of our family law system.[25]

3.26 The Department also referred to a second case:

> … the Attorney General had referred not by name but by the description, to the Ashmore Reef coronial inquest as another case where he thought the intervention was inappropriate … The Commission's submissions in that case were based on the alleged breach of Australia's international law obligations. But the issues raised by the commission were outside the scope of the particular international human rights principles, which the commission sought to rely on.[26]

3.27 At the Committee's earlier hearing, Ms Susan Roberts of the HREOC, had said that in relation to the coronial inquest:

> …the Commonwealth opposed our application to intervene …but we were granted leave to intervene. We played a full role in the inquest, and our submissions are quoted significantly in the coroner's report.[27]

3.28 It is noted that in the Coroner's findings he stated that:

> … written submissions on behalf of the Human Rights and Equal Opportunity Commission, which were supported by the written submissions prepared on behalf of the families of the deceased, placed emphasis on article 6 of the International Covenant on Civil and Political Rights.[28]

3.29 As to the case of *B v B*[29] the Committee also notes that the previous Committee's 1999 report referred to a submission by Chief Justice Nicholson[30], in which he had 'confirmed that in the case of *B v B* "the Court was significantly assisted by the Commission as well as the Attorney-General"'.[31]

3.30 Mr Bret Walker SC, President of the NSW Bar Association, told the Committee he had appeared for HREOC in a number of intervention cases and said:

> …government veto on commission intervention would, strangely, remove from the most responsible human rights advocacy entity the capacity to

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25 *Committee Hansard* 29 April 2003, p. 72.

26 ibid.

27 *Committee Hansard*, 29 April, 2003, p 8.

28 *Record of Investigation into Death: Corners Act 1996* (WA), p. 24.

29 *B v B: Family Law Reform Act 1995* (1997) FLC 92.

30 Chief Justice, Family Court of Australia.

31 Committee Report, 1999, p. 8.

> intervene against governmental interests, leaving it to the court to regulate all sorts of other groups or individuals to be the only interveners against the interests of government in human rights litigation. This, in our view, is bordering on the perverse. It is not possible, seriously or in any detail, to look at the record of Human Rights and Equal Opportunity Commission interventions in the High Court and say that they have been either irresponsible as a matter of advocacy or untenable as a matter of argument.[32]

3.31 The Law Society of New South Wales also praised HREOC:

> … for the excellent work the Commission undertakes, and the judicious way in which it has intervened in the past.[33]

3.32 A number of other submissions put forward the same view.[34]

Threat to HREOC's independence and Attorney-General's potential conflict of interest

3.33 Most submissions and witnesses expressed concern that the proposed provisions pose a threat to the independence of HREOC and its capacity to be and be seen as a guardian of the human rights of Australians.

3.34 In a formal statement to the Committee, the President of HREOC, Professor Tay said:

> The Attorney-General becomes the arbiter of the public interest, while holding certain values on behalf of the Government. As "gatekeeper" and a potential party, the Attorney-General is clearly in a position of conflict of interest. His power to grant the right to intervene is not circumscribed, except where the President is a former judge, in which case explicit Ministerial approval is not required...
>
> It is certainly not appropriate for one party to a case to decide if another party is entitled to join. Surely, that is a matter for our learned judges. The arguments of the Commission and Government often differ greatly and the judge is in the best position to decide which arguments are to be put before the court.[35]

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32 *Committee Hansard*, 29 April 2003, p. 15.

33 *Submission 15*, p. 1.

34 For example, Uniting Justice Australia, (*Submission 116*, p. 10), Liberty Victoria – Victorian Council for Civil Liberties (*Submission 112*, p. 2.), People with Disability Australia Inc, (*Submission 151*, p. 17).

35 *Committee Hansard*, 29 April 2003, p. 3

3.35 Professor Tay also said 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.[36] Details of these cases are in Appendix 6.

3.36 The National Council of Churches in Australia submitted that:

> The Bill creates a conflict of interest as the Attorney-General would have the power to determine whether HREOC may intervene to present expert opinion or testimony while at the same time, representing the Federal Government in the same legal proceeding.[37]

3.37 Ms Sue-Anne Lind, Executive Director, National Ethnic Disability Alliance (NEDA) said in evidence:

> As Australians citizens and residents do not have the protection of a bill of rights, we need to know that there is an independent watchdog able to seek leave to intervene in legal proceedings whenever this appears necessary. In NEDA's view, this particular section of the bill will be used to the government's advantage. We fail to see how it will secure the rights of people with disabilities living in this country. A significant amount of discrimination actually occurs within government agencies themselves and HREOC must be able to intervene when these proceedings come up. The voices of people from an NESB with disability are often not heard by government, and restricting the ability of Australia's human rights watchdog will only serve to further stifle these voices.[38]

3.38 Many other organisations expressed strong opposition to the proposal on the basis of their perception that the proposal would undermine the independence of the Commission and raise a possible conflict of interest for the Attorney General.[39]

3.39 Associate Professor Beth Gaze of the Castan Centre for Human Rights Law, Monash University, put forward an historical perspective, saying:

> The history of human rights, and in particular of civil and political rights, is that they have been asserted first of all against governments …The protection of individual rights against encroachment is … of fundamental importance, especially in the absence of any direct enforceable 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

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36 *Committee Hansard*, 29 April 2003, p. 2.

37 *Submission 125*, p. 3.

38 *Committee Hansard*, 29 April 2003, p. 38.

39 For example ACOSS *Submission 94*, Amnesty International *Submission 142A*, Aboriginal Legal Rights Movement *Submission 55*, WEL *Submission 85*, WETTANK, *Submission 83*, PIAC *Submission 121*, Law Council of Australia *Submission 221*, Law Society of NSW *Submission 15*, Law Institute of Victoria *Submission 158A*, People with Disability Australia Inc. *Submission 151*.

> would be to seriously undermine what limited protection exists in Australia at present for human rights.[40]

3.40 The Uniya Jesuit Social Justice Centre drew attention to a current case in which the Commonwealth and the Commission (as intervener) have been involved and have put forward different perspectives:

> [The proposal in the Bill] is fundamentally at odds with the commission's role in monitoring the Government's compliance to international human rights obligations. The recent *Al Masri*[41] decision in which the commission's submission clearly assisted the Court's determination of Australia's international obligations is a clear example of why the proposed changes must be rejected. The commission's submission in *Al Masri* differed from that of the Government and in such a case it would be inappropriate for the commission to seek approval from the executive government in the exercise of the intervention power.[42]

Duplication and waste of resources

3.41 In his Second Reading speech, the Attorney-General said the proposal was intended to prevent duplication and waste of resources.

3.42 In relation to the cost of the Commission's interventions, Professor Tay stated:

> 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.[43]

3.43 In relation to the issue of duplication (as discussed above at paragraph 3.22) Professor Tay said that in 16 of the 18 cases involving both the Commission (as intervener) and the Commonwealth, the Commonwealth's arguments were contrary to the Commission's.[44]

3.44 Associate Professor Gaze said:

> 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

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40 *Submission 159*, p. 3.

41 *Minister for Immigration & Multicultural &Indigenous Affairs v Al Masri* [2003] FCAFC 70. The decision is now the subject of an Application by the Minister for special leave to appeal to the High Court of Australia. (A206 of 2003, Adelaide Office, Registry of High Court of Australia).

42 *Submission 115,* p. 1.

43 *Committee Hansard*, 29 April 2003, p. 3.

44 ibid.

> resources. 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.[45]

3.45 The Public Interest Advocacy Centre (PIAC) drew attention to existing safeguards in court rules, namely the Federal Court of Australia's Rules of Court which require the Court to have regard to:

> (a) whether the intervener's contribution will be useful and different from the contributions of the other parties; (b) whether the intervention might unreasonably interfere with the ability of the parties to conduct the proceedings as they wish; and (c) any other matter that the court thinks relevant.[46]

Court response to Commission's interventions

3.46 An example of the beneficial role played by the HREOC in intervening in legal proceedings was given by Ms Rachael Wallbank, an accredited specialist family law solicitor[47] who represented clients in *Attorney-General for the Commonwealth v Kevin and Jennifer*[48]:

> Simply put, the unique resources and expertise of the Human Rights and Equal Opportunity Commission enabled the Court to be efficiently informed of international and other human rights and Australian and historic facts, issues and considerations that would have been beyond the practical capability of my clients otherwise.[49]

3.47 Ms Wallbank said that this role was 'recognized by the Full Court of the Family Court in its decision delivered 21 February 2003'.[50]

3.48 In another case, involving the issue of consent to surgical treatment, *Re Michael: John Briton, Acting Public Advocate (Victoria) v GP and KP and the Human Rights and Equal Opportunity Commission*[51] the court said of HREOC's role:

> I found two of [its] submissions of very considerable assistance indeed … and those submissions I found helpful, attractive and soundly based in law.[52]

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45 Castan Centre for Human Rights Law *Submission 159*, p. 3.

46 *Submission 121*, p. 6, citing Order 6 Rule 3. PIAC also referred to Order 17 Rule 3 'which explicitly states that "the role of the intervener is solely to assist the Court in its task of resolving the issues raised by the parties."'

47 *Submission 126*.

48 (2001) Fam CA 1074 and (2001) FLC 93-087.

49 *Submission 126*, p. 1.

50 ibid. The Court said '…we were most indebted to the Commission for its assistance which proved very helpful to us in considering this matter' (2003) Fam CA 94 at paragraph 342.

51 (1994) FLC 92, per Treyvaud J.

Defence of human rights principles

3.49 Mr Bret Walker SC, President of the NSW Bar Association argued:

> … human rights which cannot be levelled against a government except by the government's permission do not really deserve that term; they should not be called human rights if they cannot be argued against the government except with the government's permission …[53]

3.50 Mr Walker also said that Australia had 'a commission with an unparalleled collection of expertise and, now, tradition' and stated:

> It seems, therefore, to the Bar Association curious to deny the court—and therefore the public interest—the specific skills and expertise of the commission intervening, not always to put an opposing point of view but quite often to put a different point of view from a different angle from that of the government of the day.[54]

3.51 In relation to the Attorney-General's proposed exercise of his or her discretion 'in the public interest', Mr Walker said:

> … there is no such thing as monolithic public opinion or monolithic public interest.
>
> Rather, there are individual opinions—some more worthy of attention than others, and no doubt those of a minister of the Crown are always institutionally worthy of real attention—which take a particular vantage point. On matters of opinion and controversy, the notion that one voice could capture better than any other voice a range of opinion is self-defeating …[55]

Conflict with the '*Paris Principles*'

3.52 The Australian Lawyers for Human Rights (ALHR) focused particularly on international aspects of the proposal, saying that the amendments compromised the Commission's independence:

> The proposal is in breach of the letter and the spirit of international statements as to the importance of independent national human rights institutions, including the UN General Assembly Resolution on *National Institutions for the Promotion and Protection of Human Rights*,[56] and the

52 At paragraphs 15 and 17 respectively.

53 *Committee Hansard*, 29 April 2003, p. 16.

54 ibid.

55 *Committee Hansard,* 29 April 2003, p. 17.

56 A/RES/48/134 of 20 December 1993.

> Principles relating to the Status of National Institutions Competence and Responsibilities ("the *Paris Principles*")[57] …
>
> The *Paris Principles* require that the Commission should be afforded independence. The Office of the United Nations High Commissioner for Human Rights has developed a guideline for the Paris Principles[58] which describes four essential characteristics of independence …[59]

3.53 One of the principles is 'independence through operational autonomy'. The ALHR went on to argue that the proposed amendments undermine that principle because of the Attorney-General's power of veto.[60]

3.54 Similarly, Amnesty International submitted that:

> The Bill constitutes a retrograde step in terms of HREOC's compliance with the *Paris Principles* and cannot be over-emphasized. The current Bill is a move away from fulfilling the norms to which the principles aspire … [T]he *Paris Principles* set out the best practice standards for [National Human Rights Institutions (NHRIs)]. In their 2002 resolution on NHRIs, the United Nations Commission on [H]uman [R]ights noted, with satisfaction, the efforts of those States that have provided their national institutions with more autonomy and independence'.[61] The Office of the High Commissioner for Human Rights describes how NHRIs are able to 'take a leading role in the field of human rights owing to their separation, "from the responsibilities of executive governance and judicial administration."[62]

Educative role of interventions

3.55 Dr Penelope Mathew, senior lecturer at the Australian National University, submitted that the Commission's power to seek leave to intervene in proceedings involving human rights issues is important as part of its educative role:

> HREOC's interventions are an integral part of the educative function which the bill seeks to strengthen….[C]ounsel are not always well versed in relevant international legal principles. An independent right on the part of HREOC to intervene in litigation is one way of performing an educative

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57 Commission on Human Rights Resolution 1992/54 (3 March 1992), annexed to and adopted by United Nations General Assembly Resolution 48/134 (20 December 1993).

58 Centre for Human Rights *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (Professional Training Series No. 4), Geneva, 1996.

59 *Submission 174* , pp. 7-8.

60 *Submission 174*, p. 8.

61 *Submission 142A*, p. 7, citing 'National institutions for the promotion and protection of human rights', Commission on Human Rights resolution 2002/83.

62 *Submission 142A*, p. 8, citing the Office of the High Commissioner for Human Rights *Fact Sheet No.19 National Institutions for the Promotion and Protection of Human Rights* (Geneva 1993).

> function with a potentially direct and positive impact for the observance of human rights in Australia. It should not be removed.[63]

3.56 Ms Ronnit Redman, of Gilbert and Tobin Centre for Public Law and law lecturer at the University of New South Wales, expressed similar views:

> … if you take away the commission's voice, you are going to diminish the opportunity of the community as a whole to engage with human rights issues within the law. It is our view that this engagement is crucial to education. We see education as active debate and discussion, not merely the passive receipt of information—leaflets, brochures and material. We in universities know how little is learnt when students are simply lectured to, but if you get them to discuss and debate something, if you get them to actively do something practical that affects their lives, then they learn. The personalising of human rights issues through complaint-handling types of mechanisms and through litigation is an important component of a human rights education.[64]

Inadequate accountability of Attorney-General's decisions

3.57 Dr Phillip Tahmindjis of the International Bar Association drew attention to what he saw as the inadequacy of the accountability of the Attorney-General's decision-making on Commission requests for approval.

> - The process of approval is mandatory and the decision is final. If the Attorney General does not approve the intervention, the Human Rights [C]ommission is prohibited from intervening. There is no provision to appeal against the decision.
>
> - Although the amendments provide grounds on which the Attorney-General may decide to allow or prohibit the intervention, these are expressed not to be exhaustive. The ground for the decision may validly be a political one or based on anything perceived to be expedient. Potential breaches of human rights may therefore be ignored.[65]

3.58 The Department acknowledged in evidence that the Bill does not give any right of review of such decisions and agreed that nothing in the legislation required publication of the matters that the Attorney-General would take into account in making his or her decision.[66]

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63 *Submission 122*, p. 6.

64 *Committee Hansard*, 29 April 2003, p. 21.

65 *Submission 189,* p. 2. Dr Tahmindjis is an Australian currently working in London for the Human Rights Institute of the Association and is a former member of the Queensland Anti-Discrimination Tribunal.

66 *Committee Hansard*, 14 May 2003, pp. 72-73.

3.59 The Committee notes that in relation to clauses in legislation giving a decision-maker very wide jurisdiction, as in this case:

> The more subjective the power the less likely it is that its limits will be breached.[67]

Time constraints on the Commission

3.60 Several submissions expressed concern about the difficulties the Commission would face in matters of urgency, if the Commission needed either to apply for the Attorney-General's approval or to give the Attorney-General notice of, and reasons for, the Commission's intention to seek leave to intervene.

3.61 Both the HREOC and the NSW Bar Association gave examples of such urgent cases. Ms Susan Roberts of HREOC said:

> I think [the need to obtain the Attorney-General's approval] would significantly impede our ability to react quickly. Particularly if we are notified of matters on a Friday and the matter is before the court on a Monday—which has happened in the past—there is no requirement in the legislation as to how expeditiously the Attorney-General should consider the granting of permission. There is no link between that process and the timing of the court or the timing of the actual subject matter of the proceedings. So our ability to react quickly to often the most urgent of cases—which are those ones that often do come up extremely quickly, given that they are particular circumstances of dire human rights breach—will be severely compromised.[68]

3.62 The NSW Bar Association argued:

> …the proposed amendments would stifle the Commission's ability to act swiftly in urgent cases, particularly where the human rights concern the rights of persons in detention. In two instances, the Commission sought leave to intervene in proceedings on less than 24 hours notice.[69]

No change

3.63 Finally, a number of submissions referred to the previous Committee's report on the 1998 Bill, expressing approval of its recommendation opposing the then proposed power of the Attorney-General to approve proposed interventions by the

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67 See Administrative Review Council *The Scope of Judicial Review - Discussion Paper 2003,* Commonwealth of Australia 2003, p. 159, which provides a brief discussion of the applicable law on this aspect of judicial review.

68 *Committee Hansard,* 29 April 2003, p. 13.

69 *Submission 124*, p. 1. The first case was *Langer v Australian Electoral Commission* (No.1) (1996) 186 CLR 302 where the Commission was asked to intervene following Mr Langer's decision to represent himself on the eve of the Full Court appeal. The Commission was granted leave to appear as *amicus curiae.* More recently the Commission intervened in *Victorian Council of Civil Liberties v Minister for Immigration* (2001) 110 FCR 452.

Commission and stating, in effect, that the recommendation should stand as nothing had changed in the intervening period.[70]

Notification to the Attorney-General and giving reasons

3.64 The second area of contention was the proposal that where the President is or was a judge, the Attorney-General should be notified of the Commission's intention to seek leave to intervene a reasonable period of time before the court proceedings.

3.65 The principal objections to this proposal were:

- two classes of potential Presidents would be created, one having less power than the other;
- if a serving federal judge were appointed there could be an issue as to whether it is constitutional for a serving federal judge to be required by statute to be involved in carrying out a number of the functions of the Commission;
- there could be at least a perception that informal approval by the Attorney-General would be required, thus reducing community confidence in the independence of the Commission; and
- in cases of urgency, there could be difficulty for the Commission in complying with the requirement that the notice to the Attorney-General be given 'when there is still a reasonable time before the Commission seeks leave to intervene'.

Two classes of President

3.66 The HREOC was strongly opposed to having two classes of President for the purposes of the intervention power:

> If the different process that is proposed when a federal judge is President of the Commission seeks to avoid the invalidity that existed in *Wilson's case*,[71] then it follows that where the President is not a federal judge and the approval of the Attorney-General is required for an intervention, it could be perceived that the Commission ceases to be able to exercise the intervention function with integrity. The relationship becomes one where the Commission is subject to the individual discretion of the Attorney-General in the performance of one of its important statutory functions.
>
> Furthermore, the proposed existence of a different regime where a federal court judge is President effectively creates two "classes" of President: one that is considered to be able or trusted to act independently when participating in Commission decisions as to whether to intervene in cases and one that is considered to not have these qualities. This perception is

70 For example, Uniya Jesuit Justice Centre *Submission 115,* Law Council of Australia *Submission 221*, Law Institute of Victoria *Submission 158A*.

71 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

> insulting to persons appointed to the position of President who are not federal court judges.[72]

3.67 Others such as the Law Council of Australia[73] and Professor Peter Bailey AM OBE, and eight other Law Faculty members of the Australian National University[74] were similarly opposed.

Possible constitutional issues

3.68 Mr Bret Walker SC expressed concern about a number of the functions of the Commission under section 11[75] of the HREOCA and other non-judicial functions that a serving Chapter III judge, as President of the Commission, would perform under the legislation.[76] He submitted that these may well be unconstitutional:

> …they would involve the President, as a member of the Commission, providing advice to the Minister. The exercise of such functions may be incompatible with the exercise of judicial power: *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR.1.[77]

3.69 Another statutory function raised as being of constitutional concern was that of the exercise of the power of the President of the Commission, if a 'current and serving member of a Chapter III court', to terminate complaints under section 46PH of the HREOCA. A person aggrieved by such a decision to terminate a complaint may seek a judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and it is:

> …clearly inappropriate for a Federal Court judge or Federal magistrate to exercise judicial review in relation to administrative decision-making by a federal judge who is President of the Commission.[78]

3.70 In response, the Attorney–General's Department told the Committee that the Department had considered Mr Walker's views expressed in his submission:

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72 *Submission 103*, p. 9.

73 *Submission 221*, p. 9, and *Submission 73*, p. 4.

74 *Submission 124*, pp. 2-4.

75 For example, under subsection 11(1) of the HREOCA the Commission (headed by the President) may of its own initiative or at the request of the Minister examine 'enactments' and report to the Minister on any inconsistencies between the enactments and any human right (paragraph 11(1)(e)). There are other similar functions under section 11 such as that involving examining matters relating to human rights and reporting to the Minister on recommended laws or action (see paragraph 11(1)(j)). There are also such functions under section 31 of the HREOCA – all functions that will not be altered by the Bill.

76 For example, section 31 which gives the Commission similar functions to those under section 11, concerning 'equal opportunity discrimination' issues.

77 *Submission 124*, p. 3.

78 *Submission 124*, pp 3-4.

> We confirmed that in all the instances referred to in that submission it is the government's view that those functions are consistent with Chapter III of the *Constitution* with a judge performing those functions.[79]

Possible perception that Attorney-General's informal approval is required

3.71 The Law Council of Australia expressed concern that:

> The notification process would appear to increase the ability of the government of the day to influence the Commission in its intervention decisions. This impression is strengthened by the Explanatory Memorandum to the Bill at paragraph 76, which rather unfortunately refers to 'the requirement for the new Commission to notify the Attorney-General of its intention to seek leave to intervene in court proceedings and its reasons for doing so, but not requiring the Attorney-General's *formal* [emphasis added] approval of this function.[80]

3.72 The Council went on to say that:

> In principle there is nothing to object [to] in the Commission informing the Attorney General of its intervention decisions, and its reasons for doing so. The problem is in the apprehension (whether correct or not) that the mechanism is designed to allow the Attorney-General informal approval of interventions.[81]

Cases of urgency

3.73 Evidence to the Committee concerning the difficulties that could arise in urgent cases if reasonable notice of the Commission's intention to seek leave to intervene, and of the reasons for it, are required, are discussed above in paragraphs 3.60 – 3.62.

Possible alternatives

3.74 The Law Council of Australia preferred that the existing legislative provisions should remain unchanged, but if there were to be a change:

> …then the legislated notification process (to apply whether or not the President was, or immediately had been, a federal judge) might be acceptable. However, in the first instance, the Law Council believes the [previous] Senate Committee's suggestion … of more effective communication systems between the commission and the Attorney-General, be attempted without recourse to legislation.[82]

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79 *Committee Hansard*, 24 April 2003, p. 66.

80 *Submission 221*, p. 9.

81 ibid.

82 ibid.

3.75 Whilst strongly opposing the Attorney-General's proposed approval power, nine members of the Faculty of Law at the Australian National University indicated that a statutory notification provision, applying whether or not the President is a federal judge, might be acceptable:

> … those who will be appointed as President will have a status equivalent to that of a judge, even if not one, as is the case with the current incumbent. Given the wisdom of the Constitution, on one hand, and the sensitive functions of the Commission, on the other, the same requirement should apply without distinction. That is, the President should, in all cases, advise the Attorney-General in timely fashion to give the opportunity to consult, rather than in some cases be subject to a veto….[83]

3.76 The submission elaborated:

> If some communication with HREOC on interventions is desired, it should be as proposed for the President if a Judge. Decisions by HREOC about interventions should be based on criteria such as are included in the bill, and the annual report should be required to give details for Parliamentary scrutiny.[84]

3.77 The Committee notes that there is no current statutory requirement that the HREOC report annually on each of the proceedings in which it seeks leave to intervene. However, HREOC annual reports do provide a summary of most of these matters.[85]

3.78 In evidence the Attorney-General's Department acknowledged that it was correct that if the President of the Commission were a judge as opposed to a non-judge, when the President provides notification and reasons, the Attorney-General would accept that.[86]

The Committee's conclusions

3.79 The Committee notes that the Attorney-General has indicated he is not arguing that Commission's intervention function has never been useful, but does consider that the Commission has sometimes intervened inappropriately and that the safeguard of requiring the Attorney-General's approval is appropriate. Two matters

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83 Professors Peter Bailey, Andrew Byrnes, Hilary Charlesworth and Mick Dodson, Messrs Don Anton, Wayne Morgan and James Stellios, Dr Penelope Mathew and Ms Anne Naughton, *Submission 73*, p. 4.

84 ibid.

85 For example, the HREOC *Annual Report 2001-2002* summarises seven of the nine cases during 2001-2002 in which the Commission sought leave to intervene (pp. 85-90).

86 *Committee Hansard*, 14 May 2003, pp. 73-74.

have been cited by his Department, one of which was considered by the previous Committee.[87]

3.80 However, the Committee has concluded that the countervailing considerations are of greater weight. Whilst there have been instances where the Commission has intervened in cases where the Commonwealth was putting forward a strong opposing argument, the Committee believes that there is no reason to consider that the approach taken to such interventions, for which the relevant courts gave leave, was a misuse of the Commission's power. There are such fundamental matters of principle involved that the Committee believes it would be inappropriate for the Attorney-General to have the power of approval of proposed interventions by the Commission.

3.81 These matters include the centrality of the Commission's independence from the executive government to enable it effectively to fulfill its functions, and be seen to do so – nationally and internationally; the strong potential for conflict of interest issues to arise in matters in which the Commission and the Commonwealth may each have an interest;[88] the inappropriateness of the proposed power of the Attorney-General in relation to the discretion of the courts; and the potential for the court to be inadequately informed in some human rights cases if the Commission were to be prevented from intervening by a decision of the Attorney-General.

3.82 The Committee is also concerned about the lack of adequate accountability in relation to the Attorney-General decisions under the proposed provisions due to the very broad discretion under the Bill and the lack of any express or implied effective review mechanism.

3.83 As to the Attorney-General's view that duplication and waste of resources arises from the present situation, the Committee considers that this does not warrant the proposed provisions requiring the Attorney-General's approval. The Commission is already bound by the HREOC to ensure that its functions are performed 'efficiently and with the greatest possible benefit to the people of Australia'.[89]

3.84 In addition, the issue of duplication and cost is considered by the court whenever an application to intervene is made and the court has power to order the intervener to pay any additional costs. The HREOC itself has kept its costs in intervention matters low. Evidence that, in over 17 years under successive Presidents, the Commission has never been refused court leave to intervene, and has spent

87 *B v B - Family Law Reform Act 1995* (1997) FLC 92, and the *Ashmore Reef Coronial Inquiry* [*Record of Investigation into Death*, *Coroners Act 1996* (WA)] Ref. No. 29/02.

88 As mentioned above, the HREOC says that in 16 of the 18 cases in which the Commonwealth and the Commission have been parties, the Commonwealth's arguments were contrary to the Commission's.

89 HREOCA subparagraph 10A(1)(b).

$200,000 (0.5% of its budget) in such cases, is telling. The Committee notes also that the previous Committee did not support such restrictions on the intervention power.[90]

3.85 The Committee therefore does not support the provisions of the Bill requiring a non-judicial President to obtain the approval of the Attorney-General to any proposed intervention in court proceedings.

3.86 Where the President is a federal judge or former judge, the Committee is not convinced that different provisions should apply. The Committee considers that this does, in effect, create two classes of President, with resulting significant implications for perceptions of the Commission's independence from government – a key characteristic for a national human rights institution.

3.87 If adopted the provisions would mean that the Attorney-General and the government of the day would have the power to determine whether or not the Attorney-General would be able to approve or refuse to approve a proposed intervention by the Commission – simply by appointing a non-judicial rather than a judicial President. In addition, the provision might make it less likely that an able non-judicial person would be willing to accept appointment as President.[91]

3.88 The Committee has considered the suggestion made in some submissions that the Bill be amended to require the Commission in all cases to give the Attorney-General notice and supporting reasons for doing so a reasonable period before the proposed intervention. The Committee notes that HREOC's existing published guidelines on interventions already provide for reasonable notification to the Attorney-General of a Commission decision to seek to intervene and of its reasons.

3.89 In evidence to the Committee the Attorney-General's Department said that where a federal judge or former federal judge is the President, the Attorney-General's Department considers that there would be no constitutional issue to be considered when notification of a proposed intervention was received and that the Attorney-General would have confidence in the judgment of the President in deciding that there should be an intervention.[92] In view of the requirement of the HREOC's current Guidelines, under which the Commission must give notice of intention to intervene, and the reasons, to the Attorney-General's Office and the Human Rights Branch of his Department 'as soon as practicable' after the Commission decides to apply to intervene, the Committee considers it unnecessary to legislate for such notice to be given.

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90 Committee Report 1999, p. 10, discussed above at para 3.63.

91 The Committee notes that the Government has recently appointed the Honourable Justice John von Doussa as the next President. Justice von Doussa, a Federal Court judge since 1988, will take up his appointment on 10 June 2003.

92 *Committee Hansard,* 14 May 2003, p. 74.

3.90 In addition, the submissions and evidence received by the Committee indicate that on occasions there is very little time available between a decision being made to seek leave to intervene, and action being necessary to apply to the court, and a statutory requirement such as that proposed might cause more difficulties than it overcomes. The Committee believes that informal arrangements should be made between the Commission and the Attorney-General to overcome the concerns that have given rise to the provision.

3.91 The Committee concludes that administrative requirements such as HREOC's present guidelines are preferable to statutory arrangements for such notification with few, very general, non-exclusive criteria. The HREOC guidelines are more specific, comprehensive and exclusive than are the factors set out in the Bill.

Recommendation 2

The Committee recommends:

(a) that proposed subsections 11(5) and (6), subsections 31(2) and (3) and the equivalent provisions of the Bill amending the *Disability Discrimination Act 1992*[93], the *Racial Discrimination Act 1975*[94] and the *Sex Discrimination Act 1984*[95] concerning the requirement for the Commission to seek the Attorney-General's approval or to notify him or her of any proposed application to seek leave of a court to intervene not be agreed to;

(b) consideration be given to developing informal arrangements to improve communications between the Commission and the Attorney-General in order to alleviate potential difficulties in relation to intervention matters; and

(c) consideration be given to amending the Bill to require the Commission, in its annual report, to provide details of all legal proceedings in which the Commission has sought leave to intervene during the year.

Senator Scullion dissents from this recommendation.

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93 Proposed new subsections 67 (3) and (4), DDA.

94 Proposed subsections 20(2) and (3), RDA.

95 Proposed subsections 48(3) and (4), SDA.

CHAPTER 4

OTHER ISSUES

4.1 This chapter discusses the remaining issues in the Bill on which the Committee received evidence, namely:

- the proposed change of HREOC's name to the Australian Human Rights Commission;
- the requirement that the Commission use a new by-line;
- the making of education, information and assistance central functions;
- removal of the power to recommend damages or compensation;
- centralisation in the President of complaint investigations and conciliation powers;
- enabling the Attorney-General to appoint part time Complaints Commissioners to whom the President may delegate complaint-handling functions; and
- the repeal of provisions for establishing a Community Relations Council and advisory committees.

Change of name

4.2 Proposed subsection 7(1) renames HREOC as the Australian Human Rights Commission.

4.3 The Attorney-General noted:

> The government agreed to the name, suggested by the president of the commission, which is consistent with the names of other human rights institutions in our region.[1]

Evidence to the Committee

4.4 HREOC noted that it was 'generally supportive' of the proposed change of name[2] although it was satisfied with the current title.[3] Most of those submissions which commented on this aspect of the Bill were also supportive on the basis that the

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1 Second Reading Speech.

2 *Submission 103*, p. 2.

3 *Submission 103*, p. 22.

proposed title reflected common usage,[4] although one opposed it on the basis that the reference to equal opportunity 'must not be eliminated'.[5]

4.5 The Human Rights Council of Australia, of whom former Human Rights Commissioner Chris Sidoti is a member, argued that the name reflected the origins of the present body (set up to replace, amongst other things, committees that were undertaking functions in relation to International Labour Organisation (ILO) Convention 111 on discrimination in employment and occupation). Today, the name is 'unnecessarily long and unwieldy':

> Anti-discrimination or equal opportunity is a sub-set of human rights. The words add nothing to the concept of human rights and so are unnecessary.[6]

The Committee's view

4.6 The Committee considers that the proposed name change is suitable in that it reflects common usage and is consistent with international practice. The Committee does not recommend any change to proposed subsection 7(1) of the Bill.

By-line to be used

4.7 Proposed subsection 11(1A) states that the Commission must seek to raise public awareness of the importance of human rights by using, and encouraging the use of, the expression 'human rights – everyone's responsibility'. Proposed subsection 11(1B) states that the Commission may incorporate the expression in its logo and on its stationery.

4.8 The Attorney-General stated that the incorporation of the by-line 'supports the legislative refocus of the commission's functions'.[7] The subsections that provide this refocus 'emphasise the particular educative role of the new Commission'[8] and:

> … are based upon the principle that for a person to be able to enjoy human rights, there is a corresponding responsibility for persons and organisations to respect those human rights. New subsection 11(1A) seeks to raise public awareness of this responsibility by instructing the Commission to find opportunities to use the expression ***human rights – everyone's responsibility***. New subsection 11(1B) provides examples of the use of the expression as a by-line in the Commission's logo and on its stationery.[9]

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4 For example, Australian Lawyers for Human Rights *Submission 174*, p. 3; Human Rights Council of Australia *Submission 23*, pp. 1-2.

5 Union of Australian Women *Submission 162.*

6 Human Rights Council of Australia *Submission 23*, p. 2.

7 Second Reading Speech.

8 Explanatory Memorandum, p. 8.

9 ibid.

Evidence to the Committee

4.9 The by-line was supported by the Federation of Ethnic Communities' Councils of Australia:

> The adoption of the new Commission's by-line – *human rights – everyone's responsibility* – is an important symbolic measure. A sense of collective responsibility must play an important role in advancing human rights.[10]

4.10 However, almost all other submissions that commented on this aspect of the Bill were opposed. HREOC's submission registered concern that legislating the use of the slogan would provide administrative difficulties if it wished to vary its slogan:

> The Commission has adopted different by-line-type messages according to contemporary circumstances, priority and need. For example, during 1998 our stationery carried the by-line "Fiftieth Anniversary Year: Universal Declaration of Human Rights: 1998". Our current posters and postcards carry the message "Australia: Discrimination Free Zone". A legislatively imposed by-line will at best inhibit the Commission's ability to adjust its messaging to meet changing circumstances and priorities.[11]

4.11 This view was supported by the New South Wales Council for Civil Liberties:

> In the interests of simplicity, and in not cluttering legislation with trivial and unimportant matters, the Councils for Civil Liberties recommend that this provision be removed. This will also ensure that the Commission is free to choose and change its slogan without requiring the approval of Parliament.[12]

4.12 The Women's Electoral Lobby expressed a concern about this issue:

> '[T]he slogan "Human rights: everyone's responsibility" is unnecessary and unproductive. This slogan, while sounding inclusive, implies that the responsibility for human rights breaches [lies] with those who may have suffered discrimination.'[13]

The Committee's view

4.13 The Committee notes the concerns expressed about mandating the use of a by-line. However, on balance the Committee believes that the by-line 'human rights –

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10 *Submission 128*, p. 3.

11 *Submission 103*, p. 22.

12 New South Wales Council for Civil Liberties and University of NSW Council for Civil Liberties, *Submission 81*, p. 18. This view was shared by the Centre for Human Rights Education, Curtin University of Technology, *Submission 88*, p. 4, and the Catholic Commission for Justice Development and Peace (Melbourne), *Submission 117*, p. 10.

13 Women's Electoral Lobby Australia, *Submission 52*, p. 9. Concerns were also expressed by Women's Rights Action Network Australia, *Submission 89*, p. 5 and Associate Professor Dianne Otto, *Submission 46*, p. 2.

everyone's responsibility' may assist in promoting the Commission's role in educating Australians of the importance of human rights, and the responsibility of all Australians to respect them. It is important in practice to ensure that the provisions do not restrict the Commission from adopting particular themes for different promotional activities, but the Committee notes that the Bill states that the use of the by-line on stationery and in the Commission's logo is suggested, rather than mandatory.

Education, information and assistance to be central functions

4.14 Subsection 11(1) of the Act sets out HREOC's functions. The Explanatory Memorandum states that proposed amendments to that subsection:

> … make education and dissemination of information on human rights the central focus of the new Commission's functions, primarily by re-ordering and enhancing the existing functions set out in subsection 11(1).[14]

4.15 Four new paragraphs are added to subsection 11(1). Paragraphs 11(1)(aaa), (aac) and (aad) 'broadly reflect'[15] existing paragraphs 11(1)(g), (h) and (n) (which are repealed), but add references to the responsibility of persons and organisations to respect human rights. The new paragraphs are:

- promoting an understanding, acceptance and public discussion of human rights in Australia, and of the responsibility of persons and organisations in Australia to respect those rights (paragraph 11(1)(aaa));
- undertaking research and educational programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and coordinating any such programs undertaken by any other person or authority on behalf of the Commonwealth (paragraph 11(1)(aac)); and
- preparing, and publishing in a manner the new Commission considers appropriate, guidelines for avoiding acts or practices of a kind in respect of which a function is conferred by paragraph 11(1)(f)[16] (paragraph 11(1)(aad)).

4.16 Proposed paragraph 11(1)(aab) gives the Commission a new function, that is, disseminating information on human rights, and the responsibility of persons and organisations to respect those rights.

4.17 In addition, the Bill amends the SDA by including reference to certain Commission educational functions, namely promotion of understanding of the SDA, dissemination of information on discrimination under the SDA, preparation of guidelines for avoiding such discrimination and undertaking of research and educational programs (item 134).

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14 Explanatory Memorandum, p. 7.

15 ibid.

16 That is, inquiring into acts or practices inconsistent with or contrary to any human right, done by or on behalf of the Commonwealth or a Commonwealth authority, under an enactment or within a Territory.

Evidence to the Committee

4.18 Many submissions expressed the view that education was already being carried out by HREOC, and that amending the Commission's statutory functions to make it a central focus was unnecessary. HREOC did not disagree with the importance of education about human rights, but argued that it already provided substantial education:

> The Commission does not oppose the "re-focussing" as such but rather is of the view that such re-focussing is unnecessary as the Commission already dedicates significant resources and priority to its educative role. In the 2001/2002 financial year the Commission distributed over 95,000 copies of its publications. 50,000 of these were as a result of direct requests from members of the public.[17]

4.19 In answers to questions on notice, HREOC provided the Committee with further information on its educational activities and how their effectiveness was evaluated, including by seeking feedback from teachers and educators directly and by the website.[18]

4.20 This view was supported by the Women's Electoral Lobby of Australia, whose submission noted that HREOC already played an important educative role, and questioned whether this increased focus was necessary:

> … each Commissioner has used their specialist expertise to advantage in providing education to the public on related issues. The current paid maternity leave debate given impetus by the current Sex Discrimination Comissioner is an example of such public education.[19]

4.21 While some submissions supported the provisions as increasing the educational role of the Commission,[20] others queried whether the Bill's focus on education as a central function represented an intention to reduce or limit the Commission's investigative and advocacy role:[21]

> Understood in this light, the prioritisation of community education seems like little more than a ruse to redirect the energies of the Commission away from scrutinising the activities of government, and to reduce the Commission's production of high quality and often ground-breaking

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17 HREOC *Submission 103*, p. 19, para 4.4.3.

18 HREOC *Answers to Questions on Notice*, 13 May 2003, pp. 13-15.

19 Women's Electoral Lobby Australia, *Submission 52*, p. 9.

20 South West Sydney Legal Centre, *Submission 91*, p. 2., Federation of Ethnic Communities' Councils of Australia, *Submission 128*, p. 3.

21 For example, Associate Professor Dianne Otto, *Submission 46*, p. 3, Equal Employment Opportunity Network of Australia, *Submission 90*, p. 3, Catholic Commission for Justice Development and Peace (Melbourne), *Submission 117*, p. 7.

> research into problems and barriers preventing the full enjoyment of human rights in Australia.[22]

4.22 A common concern, both in submissions and evidence, was whether it was possible for the Commission to take an effective educational role without being strongly involved in investigation and advocacy, thus linking the proposed amendments with concerns about the planned limits on the Commission's intervention power (discussed in Chapter 3).[23] Ms Ronnit Redman from the Gilbert & Tobin Centre of Public Law stated:

> We are unable to see how reducing the role of the commission to participate in litigation that affects human rights facilitates human rights education, and we are quite unable to see how it contributes to the public discussion of human rights in Australia, which is one of the functions of the commission. On the contrary, we believe it will significantly undermine the commission's ability to give voice to human rights issues within the law and consequently undermine its educative functions.[24]

4.23 A further argument was that investigation and advocacy is not only necessary to support the Commission's educational role, it is important in those instances where education fails:

> [E]ducating people about 'their responsibilities' to 'respect other people's human rights' will, hopefully, reach people of good will, of whom there are many in the Australian community. But there are also those who do not accept that people are discriminated against on the grounds of race or gender or disability, indeed who claim just the reverse (for example the 'Aboriginal industry', 'the feminist mafia'). For these people, especially when their own short-term economic interests may be undermined (for example equality of opportunity increases the competition for jobs), compliance mechanisms will be necessary to supplement education.[25]

4.24 Some submissions were opposed to increasing the educative role of the Commission at all, arguing that educating everyone of their responsibility to protect human rights detracts from the obligations of the Commonwealth Government in this regard. It was also argued that focusing on the general obligations and rights of everyone removes focus from discrimination regarding structurally disadvantaged groups. For example:

> We are opposed to the educative function as proposed in the legislation on the basis that it:

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22 Associate Professor Dianne Otto, *Submission 46*, p. 3

23 Australian Federation of AIDS Organisations, *Submission 100*, p. 2, Professor Chilla Bullbeck, *Submission 43*, p. 3, Ms Ronnit Redman *Committee Hansard*, 29 April 2003, p 21.

24 *Committee Hansard*, 29 April 2003, p 21.

25 Professor Chilla Bullbeck, *Submission 43*, p. 3.

- Emphasises the role of individuals and organizations, but not the responsibilities of Government; and

- Removes issues of discrimination from human rights discourse and generalises human rights discourse, thereby concealing the real nature and extent of problems which are generally experienced by structurally disadvantaged groups.[26]

The Committee's view

4.25 The Committee acknowledges the concerns that have been expressed about changing the legislation to make education a central function of the Commission, and acknowledges that HREOC is already involved in significant educational activities.

4.26 However, it is the Committee's view that education is an essential part of protecting human rights. By educating and assisting the community at all levels, from schools to business, in relation to their obligations and responsibilities, the Commission will not only encourage and assist Australians to defend their human rights, but to respect and observe those of each other.

4.27 The Committee recommends no change to the proposed provisions.

Removal of the power to recommend damages or compensation

4.28 Where a HREOC inquiry has found that an act or practice constitutes discrimination, the Commission currently has the power to make recommendations, amongst other things, for the payment of compensation to a person who has suffered loss or damage as a result (paragraph 35(2)(c)).

4.29 The Bill repeals that paragraph and replaces it with a new paragraph that allows the Commission to make any recommendation to remedy or reduce loss or damage, other than the payment of compensation or damages. The Explanatory Memorandum notes:

> These recommendations cannot currently be pursued in any way because, unlike in the case of discrimination under the DDA, the RDA and the SDA, the acts or practices to which these recommendations relate are not made unlawful under the HREOCA.[27]

Evidence to the Committee

4.30 The Attorney-General's Department told the Committee that the current power was anomalous given the legislative amendments since the *Brandy* decision[28]:

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26 Uniting Justice Australia, *Submission 116*, p. 9.

27 Explanatory Memorandum, p. 14.

28 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, where the High Court held that the mechanism for registration and enforcement of HREOC

> The legislation that addressed the problems identified by the court in *Brandy* removed these powers to make determinations about compensation in relation to the various anti-discrimination acts dealing with specific areas of sex, race and disability. Those matters are now dealt with by the courts. It left behind this one area where HREOC could continue to make recommendations only in relation to compensation. It was somewhat anomalous … The government considers that that type of function is not really the type of function that a body such as HREOC is equipped to perform … [I]n relation to the other Acts, it is now performed by a court. That is more the type of function that a court is skilled to perform.[29]

4.31 The Department also noted that such recommendations could not be enforced.[30]

4.32 HREOC submitted that the rationale that such recommendations are unenforceable did not justify the proposed change because of their impact in practice:

> … the reality is that in the reports issued by the Commission that have recommended financial compensation, respondents have paid the compensation in 27% of cases. One possible explanation for compliance with the Commission's recommendation is that, if a respondent refuses to make such payments, the Commission may refer to that fact in its report to Parliament and this has the potential to cause public embarrassment for the respondent. Further, to the extent that such recommendations are symbolic rather than enforceable, they may nevertheless be morally persuasive.[31]

4.33 HREOC argued that removing the power 'denigrates the pain and suffering that might be experienced':

> It is accepted legal practice for monetary awards to be seen as an appropriate (if often inadequate) form of compensation for such loss and to deny it to persons who have been found to have suffered a human rights breach is demeaning and trivialises the loss that may be suffered.
>
> In relation to complaints of discrimination in employment under HREOCA, it is unfair that a person who has suffered a loss of wages as well as pain and suffering as a result of discrimination cannot be the subject of a recommendation for compensation. This is particularly so given the real and accurate manner in which loss of wages can be calculated. It is inconsistent that a person could pursue an unfair dismissal action through the courts and receive an award for compensation but cannot be the subject of a

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determinations through the Federal Court breached the doctrine of the separation of powers under Chapter III of the Constitution.

29 *Committee Hansard*, 14 May 2003, p. 67.

30 ibid.

31 *Submission 103*, p. 16, where the Commission stated that the Commonwealth was respondent in 60 per cent of matters where the Commission recommended financial compensation in its report to the Attorney-General but no compensation was paid.

> recommendation for compensation from the body vested with the power to inquire into the alleged act or practice of discrimination.[32]

4.34 HREOC also noted that the power to make non-enforceable recommendations for compensation was held by other investigatory bodies such as Ombudsmen. Furthermore, the lack of enforceability had not deterred respondents from settling complaints, particularly in employment matters. HREOC argued:

> A respondent will be less inclined to settle a complaint if the Commission does not have the power to recommend financial compensation. Moreover, the cases in which the Commission has made such recommendations provide a useful guidance as to the amounts which could be sought or offered in conciliation.[33]

4.35 This point was supported by the South West Sydney Legal Centre:

> … the recommendation of compensation often encourages resolution of the complaint to the satisfaction of both parties, without the matter proceeding to litigation.[34]

4.36 Many other groups opposed the deletion of these provisions. The Human Rights Council of Australia argued that the stated justification (that is, that the provisions are not enforceable) was not valid, since:

> … other kinds of recommendations, which will remain possible, also "cannot currently be pursued in any way".
>
> … All a complainant can expect, in the absence of a conciliated settlement, is a report to parliament vindicating him or her and making recommendations to address the violation. There is no reason in logic or principle for the exclusion of compensation from the range of recommendations available to the Commission in reporting on a complaint. The only justification is that complaints of human rights violations can only relate to acts and practices of the Commonwealth and so recommendations in relation to those violations will only be recommendations against the Commonwealth and the Commonwealth finds it embarrassing to receive a recommendation that it pay compensation.[35]

4.37 The Human Rights Council[36] and the Caxton Legal Centre[37] stated that there could be no issue of concern about the financial impact on the Commonwealth, arguing:

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32 *Submission 103*, p. 17.

33 ibid.

34 *Submission 91*, p. 3. The Centre argued that the power was one of the 'critical elements of the law protecting human rights in Australia'.

35 *Submission 23*, p. 7.

36 Ibid.

> The Commonwealth rarely, if ever, accepts the recommendations and so they have very few financial implications for Commonwealth expenditure.[38]

4.38 The Human Rights Council argued that the Commission's ability to make such recommendations as it considered necessary should be unfettered:

> In the absence of an enforceable remedy for these complaints, unlike complaints of disability, race and sex discrimination, recommendations addressed to a person or organisation found to have violated human rights is the best way to achieve a just resolution of the matter.[39]

4.39 On another point, the National Council of Churches in Australia argued that recommendations have a 'valuable educational role in highlighting HREOC's view of the gravity of the breach'.[40]

4.40 Other groups, including the Australian Human Rights Centre,[41] the Catholic Commission for Justice Development and Peace (Melbourne)[42] and Australian Lawyers for Human Rights[43] argued that removal of the power could amount to a breach of Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR):

> The Act is the only legislation in Australia which contains a direct remedy for a breach of a "human right", defined in the Act to include the fundamental rights contained in the ICCPR. Australia is obliged by Article 2(3) of the ICCPR to ensure that any person whose human rights are violated shall have an effective remedy.
>
> The Commission's power to recommend the payment of compensation or damages is Australia's implementation [of] this obligation ... To reduce or remove this power would breach Australia's Article 2(3) obligations.[44]

4.41 Many other groups and individuals also opposed the removal of the power to make recommendations on compensation.[45]

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37 *Submission 159*, p. 6, where the Centre argued that that if this was a concern, a ceiling could be imposed.

38 *Submission 23*, p. 7.

39 ibid.

40 *Submission 125*, p. 7.

41 *Submission 102*, p. 5.

42 *Submission 117*, pp. 12-13.

43 *Submission 174*, pp. 10-11.

44 ibid..

45 For example, the ALSO Foundation *Submission 107*; Edmund Rice Centre *Submission 106*, p.2; Liberty Victoria *Submission 112*, p. 4; Uniting Justice Australia *Submission 116*, p. 11; the Anti-Discrimination Commission Queensland *Submission 118*, p. 4; Coalition of Aboriginal Legal Services *Submission 127*, p. 4; FTM Australia *Submission 133*, p. 4; National

The Committee's view

4.42 The Committee notes that the previous Committee's report on similar provisions considered it appropriate that the Commission shed 'this quasi-judicial function of recommending damages or compensation' and that it did not consider the provision would breach Article 2(3) of the ICCPR.[46]

4.43 While acknowledging the concerns expressed in submissions to this inquiry, the Committee sees no compelling reason to reach a different conclusion from that of its predecessor, and consequently does not recommend any changes to these provisions.

Centralisation of complaints investigation functions

4.44 The Commission currently has wide powers of delegation under section 19 of the Act. However, under amendments introduced in 2000, certain powers may not be delegated by the President to any Commissioners other than the Human Rights Commissioner (subsections (2A) and (2B)). Those powers include inquiry powers relating to possible breaches of human rights[47] and discrimination in employment.[48]

4.45 The Bill repeals those subsections and replaces them with a new subsection 19(2A) which prevents the President from delegating his or her powers to the Human Rights Commissioner as well as other Commissioners. The Explanatory Memorandum notes that this provision 'removes this anomaly':

> A key element of the Government's policy underlying the amendments made by the [amendments in 2000] was the decision to centralise all responsibility for complaint handling in the President of the old Commission …
>
> This [provision] will ensure that the legislation fully reflects the Government's policy on Presidential responsibility for complaint handling.[49]

Evidence to the Committee

4.46 HREOC noted that its 'consistent position' had been that the President should be able to delegate inquiry powers in relation to breaches of human rights or discrimination in employment to any of the Commissioners.[50] The Human Rights

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Association of Community Legal Centres *Submission 148*, p. 3; Law Institute of Victoria *Submission 158*, p. 2; Castan Centre for Human Rights Law *Submission 159*, p. 6; Victorian Aboriginal Legal Services Cooperative *Submission 167*, p. 2;

46 Committee Report 1999, p. 25.

47 s. 11(1)(f)

48 s. 31(b). Other powers are those relating to conciliation and referral to appropriate bodies (HREOCA, Parts IIB and IIC).

49 Explanatory Memorandum, pp. 10 – 11.

50 *Submission 103*, p. 17.

Council of Australia also argued that a 'far better approach' to the proposed appointment of Complaints Commissioners (discussed in the next section) would be to allow the President to delegate complaint handling responsibilities to other Commissioners.[51]

4.47 Because of the interaction between this proposal and the proposed appointment of the part-time Complaints Commissioners, the Committee's view on this matter is discussed at the end of the next section.

Appointment of part-time Complaints Commissioners

4.48 Proposed section 42A provides for the appointment of Complaints Commissioners, who will be delegates of the President but not members of the Commission. Complaints Commissioners must be legally qualified and are to hold office on a part-time basis for a term not exceeding five years. Proposed subsection 42A(3) states that the Attorney-General may determine the terms and conditions of appointment and may terminate such appointments at any time.

4.49 The rationale for this proposed amendment is to provide an option for managing complaint handling workloads.[52]

Evidence to the Committee

4.50 HREOC told the Committee that the amendment was unnecessary as there were no undue delays in processing complaints or issues with the President's complaint handling workload:

> If any assistance is required with the President's workload then the President has under HREOCA (and retains under the AHRC Bill) the power to delegate her powers not only to a member of staff of the Commission but also to a person outside the Commission. The President can therefore already delegate her inquiry powers to an external person (such as a retired judge or member of the legal profession) if their expertise is required or to reduce any workload issues. This current system is working well and there is no backlog in relation to the processing of complaints and all obligations under the Commission's Service Charter are being met.[53]

4.51 HREOC went further, stating that the proposed amendment would not assist 'in any way' the Commission's efficient operation:

> Its impact is to detract from the "collegiality" and cohesiveness of the members of the Commission by introducing a further layer of appointees into the structure of the Commission. The amendment also challenges the ability of the President to manage the administrative affairs of the

51 *Submission 23*, p. 8.

52 Second Reading Speech.

53 *Submission 103*, p. 18.

> Commission by appointing persons over whom the President will have no control in areas that are essential to effective and efficient complaint handling, such as the meeting of timeframes and deadlines and consistent decision making.[54]

4.52 The Human Rights Council of Australia voiced similar concerns:

> Appointment of complaints commissioners will bring more, external people into the complaint handling process who are not subject to presidential direction. Unless all complaints in a particular area of discrimination are allocated to one person it will lead to inconsistency in complaint handling. It will also require additional resources for the Commission which the Government has not indicated it will provide. A far better approach would be to permit the president to delegate complaint handling responsibilities to other members of the Commission.[55]

4.53 If the proposed provisions were to proceed, the Human Rights Council recommended two changes: removal of the requirement that the person be legally qualified, and an added restriction on the employment of current public servants, in order to avoid any compromise of the Commission's independence:

> There is no good reason why only a legally qualified person can undertake the responsibilities of complaint handling. Indeed in the past, when the specialist commissioners handled complaints, many of those commissioners were not legally qualified and yet they performed their responsibilities ably, effectively and with distinction.[56]

4.54 In response, representatives of the Attorney-General's Department told the Committee:

> The government considers that that will assist in the performance of those functions. Lawyers are familiar with principles of precedent. They have many of the skills that make someone an effective conciliator. They have legal skills such as problem identification and analysis and communication skills. In addition, they will bring the legal rigour that is critical for the preparation of reports on the issues under the legislation.[57]

4.55 Australian Lawyers for Human Rights raised a different concern in relation to the Attorney-General's proposed power to dismiss part-time complaints commissioners:

> Such a person exercises administrative function[s] which have quasi-judicial character and should be treated according to accepted principles governing

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54 *Submission 103*, p. 18.

55 *Submission 23*, p. 8.

56 *Submission 23*, p. 8.

57 *Committee Hansard*, 14 May 2003, p. 66.

> the independence of judicial officers ... Dismissal should only be on the usual judicial basis of misconduct.[58]

The Committee's view

4.56 The Committee notes the concerns expressed about the centralisation in the President of the power to conduct inquiries and the proposal to appoint part-time Complaints Commissioners who are not subject to the President's control in the same way as other Commissioners and staff.

4.57 However the Committee considers that this proposal will provide the Commission with the flexibility to handle high workloads, should the need arise. The Committee also considers that a requirement that the person be legally qualified is not unreasonable in light of the importance of the function. The Committee therefore does not recommend any changes to the proposed provisions.

Community Relations Councils and advisory committees

4.58 The Bill repeals section 17 of the Act, which currently provides for the establishment of advisory committees to advise HREOC on the performance of its functions and, when requested by the Minister, to report on Australian compliance with certain human rights standards. The Explanatory Memorandum notes:

> The new Commission will retain the power - currently in section 15 of the HREOCA - to work with and consult appropriate persons, governmental organisations and non-governmental organisations. [59]

4.59 The Bill also deletes the provisions of the RDA relating to the Community Relations Council (Part V, repealed by Schedule 1 Item 124).

Evidence to the Committee

4.60 There was little comment on these provisions, and the Committee notes that HREOC made no comment. However, the Human Rights Council of Australia supported their deletion on the basis that they were not used:

> These provisions have been used on one occasion only since the Acts were passed, in relation to an advisory committee on ILO Convention 111 under the [HREOC Act]. The provisions have been essentially inoperative since the Acts were passed. In any event, express power to appoint an advisory committee is not needed.[60]

4.61 By contrast, one submission disagreed, despite the lack of use of the provisions to date:

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58 *Submission 174*, p. 5.

59 Explanatory Memorandum, p. 10.

60 *Submission 23*, p. 7.

> The establishment of advisory committees has significant potential to assist the Commission in the performance of its functions. While other consultative arrangements will no doubt be continued by the Commission, such consultative arrangements do not have the special consultative status that an advisory committee would allow, particularly in relation to sensitive and confidential matters …[61]

The Committee's view

4.62 The Committee considers that in light of the lack of use to date of the provisions concerning advisory committees and the Community Relations Council under the RDA, their repeal is not unreasonable. Consequently the Committee does not recommend any changes to these provisions.

4.63 Subject to the recommendations in previous chapters of this report, the Committee recommends that the Bill be agreed to.

Recommendation 3

Subject to amendments outlined in the previous recommendations, the Committee recommends that the Bill be agreed to.

Senator Scullion also recommends that the Bill be agreed to, subject to his reservation on Recommendation 1.

Senators Bolkus, Ludwig and Greig do not support this recommendation for reasons set out in their dissenting report.

Senator Marise Payne

Chair

61 People with Disability Australia Inc & NSW Disability Discrimination Legal Centre Inc *Submission 151*, pp. 21-22.

DISSENTING REPORT BY ALP, DEMOCRAT AND GREENS SENATORS

Introduction: The need for an effective human rights protection mechanism

1.1 The Australian Human Rights Commission Legislation Bill 2003, which would undermine the HREOC's independence from the government and reduce its powers, does not come in a vacuum. It is a manifestation of the Howard Government's dismissive attitude to human rights in Australia, and has been introduced against a backdrop of the Howard Government's unenviable record on human rights issues. In recent times the Howard Government, for instance, has:

- introduced the wide-ranging ASIO legislation which would allow ASIO to seek a warrant to detain and question people, including children aged 14 -18 years, and adults not suspected of committing offences, for up to 48 hours (with possible extension of detention for up to seven days) to investigate terrorism offences;

- used Aboriginal and Islamic communities as 'political footballs' in relation to a range of major issues; and

- severely cut funding to the HREOC and the legal aid commissions, thus limiting their capacity to assist people affected by breaches of human rights or discriminatory actions.

1.2 It is of concern to Senators that in this climate, and in a climate of large increases in incidents of human rights abuse within Australia, the Howard Government is seeking to reduce the effectiveness and ambit of operation of HREOC.

1.3 The HREOC plays a crucial role in Australia as a protector of human rights and defender of people and groups who are discriminated against. The Commission's independent role is made more fundamental because Australia, alone among developed common law countries, does not have a Bill of Rights either in its Constitution or in legislation. In other comparable countries citizens have greater legislative protection of their human rights than do Australians

1.4 Recent Howard Government legislation such as the ASIO Bill clearly shows that Australians lack an adequate legislative guarantee that their rights and freedoms will be maintained by the government of the day.

1.5 As long as the Commission continues to provide the primary mechanism for protecting the human rights of Australians any diminution of its powers and

independence cannot be justified. In fact, the Government should enhance the Commission's independence and effectiveness in achieving its goals.[1]

The Government's failure to appoint replacement specialist Commissioners

1.6 Since 1998 the Government has, in effect, not implemented key provisions of the HREOCA in relation to the structure of the Commission itself. It has done this by not replacing the Disability Discrimination Commissioner and the Race Discrimination Commissioner when their terms of office expired. This has occurred even though the Government failed, in 1998 and 1999, to have legislation abolishing the positions of the Disability Discrimination Commissioner and the Race Discrimination Commissioner passed by the Senate.

1.7 Notwithstanding that other specialist portfolio commissioners took over the responsibilities of these vacant offices, on an acting basis, these deliberate actions by the Government have diminished the capacity of the Commission to meet the needs of Australians affected by discrimination on the grounds of race and disability without a legislative basis for doing so.

The Bill

Commission intervention in court proceedings

1.8 We join with Senators Payne and Mason in opposing the Government's proposal in the Bill to interfere with the powers and procedures of courts and to effectively undermine the independence of the Commission, by giving the Attorney-General a power of veto over any proposed intervention in a court case if the President of the Commission is not a federal judge or, immediately before his or her appointment, was not such a judge. The non-Government senators support the reasoning of Senators Payne and Mason on all aspects of this issue.

Restructure of the Commission

1.9 We strongly oppose the provisions in the Bill to abolish, and replace with generalist commissioners, the specialist commissioners - the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, the Human Rights Commissioner, the Race Discrimination Commissioner and the Sex Discrimination Commissioner.

1.10 The response from HREOC and the overwhelming majority of those who made written submissions and gave evidence to the Committee was that this was a retrograde step which failed to appreciate the importance to disadvantaged persons,

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1 See under Additional Powers for the Commission, at paras 1.47-1.48 of this dissenting report. Another suggestion is that the Commission be given power to seek injunctions in its own name where there has been a contravention of the HREOCA, the RDA, the SDA or the DDA. (See PIAC *Submissio*n *121,* p. 9.)

and also to the general community of Australians, of having access to widely recognisable, knowledgeable and experienced commissioners.

1.11 The submissions strongly emphasised the fact that specialist commissioners have particular expertise and understanding in the areas they have been dealing with over the years.

1.12 Organisations representing people with disabilities and ethnic communities emphasised that the reappointment of these specialist Commissioners was needed. At the same time many submissions specifically recognised the work of the Aboriginal and Torres Strait Islander Social Justice Commissioner.

1.13 There was substantial disagreement with the Government's contention that generalist commissioners are necessary in order for the Commission to deal adequately with discrimination issues that relate to more than one disadvantaged group (such as the situation of a woman who has a disability) and 'emerging' discrimination issues such as those relating to age or children. The Commission and many who made submissions considered that the Commission is well able to deal effectively with these additional and more complex issues. The Commission noted that, in the year 2001-2002, of 1,271 complaints received only 65 (5.1%) raised double or multiple grounds of alleged discrimination.[2]

1.14 We believe that the proposed adaptation of the proposal in the 1998 bill, giving recognition and legislative entrenchment of the present *de facto* situation under which there are three appointed Commissioners and two vacant positions, is inadequate. The positions of these latter two Commissioners – the Disability Discrimination Commissioner and the Race Discrimination Commissioner – should remain separate in the legislation and suitably qualified people should be appointed to those positions.

1.15 What is also needed is for additional funds to be made available to the Commission, so that the two vacant positions can be filled and adequately resourced in order to be able to carry out effectively the important responsibilities that these commissioners have under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA), the *Disability Discrimination Act 1992* (DDA) and the *Race Discrimination Act 1975* (RDA). Such appointments would also enable the existing Human Rights Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner to devote their attention more fully to their own areas of responsibility.

1.16 The appointments would also be likely to increase the capacity of the Commission to deal with the issues concerning children, age discrimination, the mentally ill and other relevant groups.

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2 HREOC *Answers to Questions on Notice*, 13 May 2003.

Recommendation

1.17 **We recommend that the proposed amendments in the Bill concerning the restructuring of the Commission be opposed.**

Name of Commission

1.18 We do not consider that the change of name to 'The Australian Human Rights Commission' is warranted. The Women's Electoral Lobby (WEL) said:

> The Federal Government has demonstrated its commitment to the principles of equal opportunity, for example, by renaming the Affirmative Action Agency (and the attendant enabling legislation) the Equal Opportunity for Women in the Workplace Agency. Removing 'Equal Opportunity' from the title of the Human Rights Commission is out of step with this positive policy development. WEL considers the proposed name change overly simplistic and at the expense of a clear statement of support for equal opportunity in Australia. It renders this important function invisible at a time when disadvantaged groups continue to be under-represented in government, corporate and public office positions. [3]

1.19 Professor Chilla Bulbeck submitted that:

> …the proposed amendments, including the proposal to remove 'Equal Opportunity' from the Commission's title, signals a direction of attention away from systemic economic inequality and social marginalisation towards individual behaviour and attitudes. Empirical evidence suggests that attention should be moving in the other direction if the balance between individual and structural factors is to be changed.[4]

1.20 We believe that the name of the Commission has become well known in Australia and the Asia-Pacific region over the past 17 years, that the emphasis on 'equal opportunity' is important to women and to many other minority groups that are affected by discrimination in employment or in other fields, and that HREOC, while being generally supportive of the proposed change of name, is 'satisfied with the current title'[5]. The onus is on the Government to provide compelling reasons for making the change and this onus has not been met.

Recommendation

1.21 **We recommend that the name of the Commission not be changed**.

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3 *Submission 85*, p. 9.

4 *Submission 43,* Professor Chilla Bulbeck, usual appointment, Professor of Women's Studies, School of Social Science, Pulteney Towers, University of Adelaide, p. 2.

5 *Submission 103,* p. 3.

By-line – a slogan for a mandate!

1.22 The proposal in the Bill that the Commission must use and encourage the use of the by-line 'human rights – everybody's responsibility' was opposed by most of the submissions that referred to the issue – and many did. There are two main grounds. First, the slogan is seen as wrongly shifting the responsibility for protecting human rights from the Government to the individual. As WEL put it:

> The slogan, while sounding inclusive, implies that the responsibility for human rights breaches [lies] with those who have suffered discrimination….
>
> WEL understands that an aim of this new slogan is to increase public awareness of human rights in line with HREOC adopting a more educative function. However, this function is not new: the role has always been included in that of the Commission[6]….

1.23 Associate Professor Diane Otto of the Law Faculty**,** University of Melbourne put it more strongly, stating:

> The "everyone's responsibility" approach conveys an incorrect understanding of human rights, their public nature, and the true obligations of the Australian Government to ensure that they are respected, protected and enjoyed. The proposed wording is an attempt by the Government to deny and abrogate its own responsibilities under international law and to the Australian people.[7]

1.24 The second ground for opposing the inclusion of the by-line in the Bill is that it unnecessarily incorporates in legislation something that the Commission is best placed to determine in a flexible way from time to time, depending on the circumstances.

1.25 The Commission acknowledges that, in early 2000, in the context of a Government proposal at that time to change the name of the Commission to Human Rights and Responsibilities Commission - a proposal opposed by the Commission - it did suggest that a 'succinct message' about what the organisation represented, could be added. Suggested messages were: *'fairness and equality for all Australians'* or *'human rights – everyone's responsibility.'* But HREOC has stated to the Committee that it did not propose that the 'positioning line should be legislatively based.'[8]

1.26 The non-Government Senators have concluded that the by-line is both inappropriate in substance, because it deflects attention away from the responsibility of the state in relation to protecting human rights, and would create undue inflexibility if included in legislation.

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6 *Submission 85*, p. 9.

7 *Submission 46*, p. 2.

8 HREOC *Answers to Questions on Notice*, 8 May 2003.

Recommendation

1.27 **We recommend that the provision in the Bill not be enacted**.

Making education, information and assistance the priority function

1.28 Although some submissions favoured giving education a high priority among the functions carried out by the Commission, a substantial number were sceptical about the 'refocussing' of the Commission's work in the way the Bill proposes. A number of submissions saw the Bill as:

- lowering significantly the profile of the Commission and its specialist commissioners, by replacing them with generalist commissioners; and
- reducing the Commission's credibility, as an independent body, by requiring the Commission to obtain the Attorney-General's approval before it could seek court leave to intervene in cases involving important human rights issues, thus diminishing the educative capacity of the Commission.[9]

1.29 Many submissions, including HREOC itself[10], said that the Commission already gives high priority to its educative function, and that there is much evidence that it is highly regarded in Australia and in the Asia Pacific Region for its range of educative activities and tools and the quality of its educational material. The Commission made it clear that it already has a sufficient legislative base to give education considerable emphasis, and the evidence it gave the Committee of its educational activities in recent years was impressive.

1.30 ACOSS submitted that:

> The role of the Commission in performing community education activities around human rights is an important one. However, legislating that this be a 'central role' is opposed.
>
> Priority for human rights education is best achieved through financing such efforts. In the absence of such commitment it is difficult to avoid the conclusion that such a legislated provision would result in fewer resources for the important complaints, court intervention and consultation work of the Commission. These activities contribute to community education as do other explicit community education activities of HREOC.[11]

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9 As explained in the body of the report, this requirement applies to the Commission whenever its President is not a serving federal judge or a former federal judge. Examples of submissions making this point are, Professor George Williams and Ms Ronnit Redman, University of New South Wales, *Submission 9.* p. 3, Professor Diane Otto, University of Melbourne, *Submission 43,* pp. 3-4.

10 HREOC *Submission 103*, p. 19, and in Answers to Questions on Notice 13 May 2003, pp. 13-15.

11 *Submission 94*, p. 5.

1.31 A number of women's groups, university teachers, Aboriginal organisations and others took a similar view.[12]

1.32 WEL submitted that:

> While we support extending education and information, and particularly emphasise that this must be well resourced, we are concerned that these changes will send the wrong message to perpetrators of human rights abuses. They may well assume that Government has gone soft and is less likely to use its statutory powers to reinforce the need for compliance in the search for better behaviour.[13]

1.33 We believe that the proposed legislative reordering of the Commission's priorities is unjustified and is likely to downgrade the important complaint handling and court work that is a critical part of the Commission's educative function. As is stated later in this report, if Government wants the Commission to engage in greater educational activity, it is not a new legislative charter that it needs - it is more financial and staff resources.

1.34 Accordingly we oppose the proposed changes to the Commission's educational functions which reorder the Commission's priorities to give priority to this role over other more important roles.

Recommendation

We recommend that the provisions in the Bill on the educational function not be enacted.

Removal of power to recommend damages or compensation

1.35 This proposal has been strongly opposed by HREOC, the Law Council of Australia, the Law Institute of Victoria and by many legal and other community organisations and groups. The HREOC said that:

> It is the Commission's opinion that removing the ability to recommend financial compensation for human rights breaches denigrates the pain and suffering that might be experienced in these circumstances. It is accepted legal practice for monetary awards to be seen as an appropriate (if often inadequate) form of compensation for such loss and to deny it to persons who have been found to have suffered a human rights breach is demeaning and trivialises the loss that may be suffered.
>
> In relation to complaints of discrimination in employment under HREOCA, it is unfair that a person who has suffered a loss of wages as well as pain and

12 For example, WETTANK, *Submission 83,* Aboriginal Legal Rights Movement, *Submission 55*.

13 *Submission 85*, pp. 14-15.

> suffering as a result of discrimination cannot be the subject of a recommendation for compensation.[14]

1.36 The HREOC has stated that in 27% of all cases where a recommendation that compensation or damages be paid the payment is in fact made.[15]

1.37 We do not accept the Government's argument that the power to make such orders should be removed merely because they are not legally enforceable. Recommendations of the Commonwealth Ombudsman are not legally enforceable either, yet there is no suggestion that the Ombudsman should have that recommendatory power removed.

1.38 We are satisfied that the Commission's power to recommend damages or compensation in the human rights and employment discrimination matters to which the Bill refers should be retained.

Recommendation

1.39 We recommend that the provisions of the bill concerning the power to recommend damages or compensation not be passed.

Centralisation of complaints investigation functions

1.40 The proposed further limitation on the Commission President's power to delegate his or her inquiry powers in relation to complaints about acts or practices that are contrary to human rights or involve discrimination in employment is seen as unduly restrictive - by the Commission and the Human Rights Council of Australia, among others. The Commission opposes the proposed amendment recommending instead that an amendment be made permitting the President to delegate these powers to any other member of the Commission.

1.41 Submissions from several organizations expressed a similar view.

Recommendation

1.42 **We have concluded that the proposed amendment is unjustified and recommend instead that the power of the President of the Commission to delegate the inquiry powers be expanded to extend to any other member of the Commission.**

Appointment of part-time Complaints Commissioners

1.43 There was little support, from either HREOC or the organizations that made submissions on the issue, for the proposal in the Bill for the Attorney General to have power to appoint legally qualified part-time Complaints Commissioners, who would

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14 *Submission 103*, p. 17.

15 ibid.

be delegates of the President but not members of the Commission, and carry out inquiries into complaints about breaches of human rights and discrimination in employment. As the majority report says:

> HREOC told the Committee that the amendment was unnecessary as there were no undue delays in processing complaints or issues with the President's complaint-handling workload…The proposed amendment would not assist 'in any way' the Commission's efficient operation.

1.44 The Australian Human Rights Centre expressed concern about the lack of appropriate statutory independence of such Complaints Commissioners in that they are to be part-time and could be given quite short term appointments.[16]

1.45 Other comments were to the effect that the provision was unduly restrictive in that it required legal qualifications for appointment.

Recommendation

1.46 **We have concluded that the case for the appointment of these Complaints Commissioners has not been made and, accordingly, recommend these provisions in the bill not be proceeded with.**

Additional powers for the Commission

1.47 We believe that HREOC has made sound suggestions to the Committee for improving its effectiveness in promoting and protecting human rights in Australia and these should be given serious consideration. Changes to be considered include:

- [Making] discrimination complaints, as defined in section 3 of *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) ("HREOCA") and its Regulations (which include age, sexual preference, religion/religious belief, criminal record, trade union activity, political opinion) and outlined in section 32(1) of the HREOC Act unlawful discrimination, in all areas of public life with enforceable legal rights like those afforded under the *Racial Discrimination Act 1975* (Cth) ("RDA"), *Sex Discrimination Act 1984* (Cth) ("SDA"), *Disability Discrimination Act 1992* (Cth) ("DDA") and State anti-discrimination laws.

- Extend[ing] the coverage of human rights breaches to include State acts and practices and provide enforceable legal rights for complaints that allege breaches of human rights as defined and outlined under sections 3; 11(1)(f) and 20(1) of HREOCA.

- Strengthen[ing] the monitoring role of the Aboriginal and Torres Strait Islander Social Justice Commissioner by legislatively providing for a Government response to the Social Justice and

16 *Submission 102*, p.7.

> Native Title Reports within a particular timeframe of the tabling of the Reports.[17]

1.48 The first two of these proposals have a broad reach and would need careful evaluation. There are likely to be constitutional issues involved as well as a need to consult effectively with State and Territory authorities. However, if Australia is to strengthen its protection of the human rights of all Australians which, as a matter of principle, should extend to all areas of activity in which discrimination occurs and human rights are breached, these ideas should be given weight.

Recommendation

1.49 **We recommend that these proposals be evaluated by the Government.**

1.50 **As to the monitoring role of the Aboriginal and Torres Strait Islander Social Justice Commissioner we recommend that the HREOCA be amended to require that the Government respond to the annual reports presented by that Commissioner within six months of the tabling of each report**.

Commission's budget – Need for more resources

1.51 Since the Howard Government came to office in 1996 the budget of the Commission has been cut substantially – by $7.3 million[18] ($8.086 million in real terms[19]) – after allowing for the funding that was transferred to the Federal Court of Australia and the Office of the Privacy Commissioner 2000.[20] If allowance is made for efficiency dividends and other general reductions in the funding of government agencies generally, the total sum of the cuts is reduced. However, the HREOC says it sustained two substantial agency-specific reductions in funding between 1998-99 and 2000-2001. These totalled $5.172 million in nominal terms ($5.735 million in real terms)[21]. In the 1995-96 Budget the HREOC's funding was $21.6 million.[22]

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17 HREOC Answers to Questions on Notice, 13 May 2003.

18 ibid.

19 Calculated by the Parliamentary Library Service on 23 May 2003, on the basis of the HREOC information provided in *Answers to Questions on Notice*, 13 May 2003.

20 This occurred following the transfer of the hearing function of the Commission and the Office of the Privacy Commissioner from the HREOC to those bodies.

21 Calculated by the Parliamentary Library Service on 23 May 2003, on the basis of the HREOC information provided in *Answers to Questions on Notice*, 13 May 2003.

22 Committee Report 1999 - Minority Report, Senator Jim McKiernan, p. 1.

Recommendation

1.52 **While not suggesting that the $5.735 million funding reduction should be fully restored, we recommend that the funding of the Commission be increased to enable the two specialist commissioners whose positions have been left vacant – the Disability Discrimination Commissioner and the Race Discrimination Commissioner – to be appointed and given adequate staff and resources.**

1.53 **Consideration should also be given to whether any additional funding is needed to increase the educational activities of the Commission**.

Conclusion

1.54 The Senators who have signed this report are of the view that this legislation is not worthy of a Second Reading, and should be opposed by the Senate. The legislation is fundamentally flawed, is inappropriate for a diverse, multicultural society like Australia, and is out of step with both the needs of the community and with world trends. The Government has twice before proposed almost identical legislation. This third attempt represents an ideological obsession of the Howard Government at taxpayers' expense.

Recommendation

1.55 **We non-government Senators recommend that the legislation be denied a Second Reading.**

Senator the Hon. Nick Bolkus
Australian Labor Party
Deputy Chair

Senator Joseph Ludwig
Australian Labor Party

Senator Brian Greig
Australian Democrats

Senator Linda Kirk
Australian Labor Party

Senator Kerry Nettle
Australian Greens

Senator Ursula Stephens
Australian Labor Party

APPENDIX 1

SUBMISSIONS RECEIVED

Submission No.	Submitter
1	Unity Party WA
2	Canny Alternatives Pty Ltd
3	European Monitoring Centre on Racism and Xenophobia UK Secretariat
4	Stephen Houston
5	Ms Griselda Browne
6	Mr Geoffrey Parkes
7	Mr Mark Snell
8	Mr Frank McKone
9	Gilbert & Tobin Centre of Public Law
10	The United Nations Association of Australia, Tasmanian Branch
11	Sir Ronald Wilson, AC, KBE, CMG, QC
12	Mr Lawrence R Waller
13	Ms Sarah Marshall and Mr Elvin Robert Lucic
14	Mr Richard Hanson
15	The Law Society of New South Wales
16	Ms Terese Delaney
17	Ms Juen VanHand
18	Mr Martin Oliver
19	Mr Stephen Leahy
20	Ms Freya Higgins-Desbiolles
21	Ms Marie Toshack
22	National Aboriginal and Torres Strait Islander Legal Services Secretariat Ltd
23	Human Rights Council of Australia
24	Australian Bahá'í Community
25	Mr Lawrence McNamara
26	Ms Sue Bond
27	Ms Judy McCallum
28	Ms Sally Bateman
29	Presentation Sisters, Wagga Wagga
30	Ms Majella Tracey
31	Ms Carol O'Donnell
32	Ms Sharee Harper
33	Ms Karen Darling
34	Blue Mountains Community Interagency
35	Ms Jane Harris and Ms Joyce Page
36	Ms Margaret Moffitt
37	Christian Brothers' Community
38	Ms Margaret Thornton

39	Australian WOMAN Network
40	Bishop Kevin Manning
41	Ms Anne Spencer
42	Planning Integration Consultants Pty Ltd
43	Professor Chilla Bulbeck
44	Executive Council of Australian Jewry
45	Missionaries of the Sacred Heart Justice and Peace Centre
46	Associate Professor Dianne Otto
47	Mr Martin Bain
48	Dr John Pace
49	United Nations Association of Australia
50	Mr David Allen
51	Ms Tracey Spicer
52	Women's Electoral Lobby (Brisbane)
53	Division of Education, Arts and Social Sciences University of South Australia
54	Ms Robyn Willis
55	Aboriginal Legal Rights Movement
55A	Aboriginal Legal Rights Movement
56	NSW Commission for Children & Young People
57	Sex and Gender Education (SAGE)
58	Blind Citizens Australia
59	Mr Ken Blackman
60	Multicultural Community Services of Central Australia Inc
61	Ms Celestine Pooley
62	Ms Joy Muir
63	Mr Geoff Berry
64	University of Melbourne Postgraduate Association
65	Ms Georgie Meyer
66	Conversations for the Future
67	Mr Gavin Souter AO
68	Mr Peter Harvey
69	K G Gall
70	Ethnic Communities' Council of NSW Inc
71	National Children's and Youth Law Centre
72	The Hon. Hal Wootten, AC QC
73	Professors Peter Bailey, Andrew Byrnes, Hilary Charlesworth, & Mick Dodson, Messrs Don Anton, Wayne Morgan, & James Stellios, Dr Pene Mathew and Ms Anne McNaughton, Faculty of Law, ANU
74	Waverley Council Community Services
75	Physical Disability Council of the Northern Territory (PDC-NT)
76	Dr Loretta de Plevitz
77	Sr Margaret Reed, fmm
78	Jumbunna Indigenous House of Learning
79	Goulburn Congregation of the Sisters of Mercy of Australia
80	Ms Catherine Kyne
81	New South Wales Council for Civil Liberties Inc.
82	Ms Joanne Walsh
83	Women's Economic Think Tank (WETTANK)
84	The Ethnic Communities Council of Queensland Ltd
85	Women's Electoral Lobby Austrfalia Inc

86	Women's Reconciliation Network
87	Labor Lawyers WA
88	Centre for Human Rights Education , Curtin University of Technology
89	Women's Rights Action Network Australia
90	Equal Employment Opportunity Network of Australia
91	South West Sydney Legal Centre
92	Mr Carlo Canteri
93	Alice Springs Human Rights Group
94	The Australian Council of Social Service (ACOSS)
95	Mrs J Edwards
96	National Ethnic Disability Alliance
97	NSW Ecumenical Council Incorporated
98	Mr Ben Wadham, Lecturer
99	St. George's Anglican Church
100	Australian Federation of Aids Organisations Inc
101	Trans Gender Victoria Inc
102	Australian Human Rights Centre
103	Human Rights and Equal Opportunity Commission
104	National Industry Association on Disability Services
105	Mr Geoff Fisher
106	Edmund Rice Centre
107	The ALSO Foundation
108	National Ethnic and Multicultural Broadcasters Council Inc
109	Ms Angela C Burrows
110	Sisters of Joseph NSW Justice Committee
111	Pax Christi Australia
112	Liberty Victorian Council for Civil Liberties Inc
113	Catholic Archdiocese of Sydney
114	Franciscan Missionaries of Mary
115	Uniya Jesuit Social Justice Centre
116	Uniting Justice Australia
117	Catholic Commission for Justice Development and Peace (Melbourne)
118	Anti-Discrimination Commission Queensland
118A	Anti-Discrimination Commission Queensland
119	Refugee Council of Australia Inc
120	Institute of Aboriginal Development Inc
121	Public Interest Advocacy Centre
122	Dr Penelope Mathew
123	University of Technology Sydney
124	NSW Bar Association
125	National Council of Churches in Australia
126	Rachael D Wallbank
127	Coalition of Aboriginal Legal Services NSW
128	Federation of Ethnic Communities' Councils of Australia
129	Australians for Native Title and Reconciliation SA Inc
130	Australian Council of Human Rights Agencies (ACHRA)
131	Children by Choice Association Incorporated
132	Ms Lisa Roberts
133	FTM Australia
134	Ms Penny Farrow

135	Ms Pauline Collins
136	Physical Disability Council of Australia Ltd
137	Mr Peter Rigby Taylor
138	The Hon. Elizabeth Evatt AC
139	New South Wales Young Lawyers
140	Muslim Women's National Network of Australia Inc
141	A Just Australia
142	Amnesty International Australia
142A	Amnesty International Australia
143	Josephite Justice Network
144	Physical Disability Council of New South Wales
145	Diocese of Parramatta
146	Aboriginal Catholic Ministry
147	Ms Sue Walpole
148	National Association of Community Legal Centres
149	Youth Affairs Network Qld
150	Presentation Justice Ministry
151	People with Disability Australia Inc and NSW Disability Discrimination Legal Centre Incorporated
152	Australians for Native Title & Reconciliation (ANTaR) Lowe Action Group
153	Ms Dorothy Bray
154	Dr Harvey Stern
155	ParaQuad Victoria
156	Indigenous Law Centre
157	Lawyers Reform Association
158	Law Institute Victoria
158A	Law Institute Victoria
159	Castan Centre for Human Rights Law
160	Equal Opportunity Practitioners in Higher Education (EOPHEA)
161	Curtin University of Technology
162	Union of Australian Women
163	Community & Public Sector Union
163A	Community & Public Sector Union
164	Indigenous Social Justice Association Inc
165	Catholics in Coalition for Justice Peace
166	Mr Don McArthur
167	Victorian Aboriginal Legal Service
168	NSW Council on Intellectual Disability
169	Social Justice Commission Toowoomba
170	Mr Shin Furuno
171	Multicultural Council of the Northern Territory Inc
172	United Nations Youth Association of Australia
173	Ms Lillian Goldsmith
174	Australian Lawyers for Human Rights
175	Dr Christopher Newell, AM
176	Franciscan Missionaries of Mary
177	Mr Ben Clarke
178	Mr David McKelvey
179	Ms Morgana Bray
180	Hornsby Area Residents for Reconciliation
181	Ms Tricia Munn

182	Mr Rory Killen
183	Dr John Tomlinson
184	Ms Amanda Lane
185	Ms Ruth O'Dwyer
186	Ms Carole Powell
187	Mr Louis Ariotti
188	Ms Pamela Menere
189	International Bar Association
190	Ms Gwynnyth Evans
191	Ms Nancy Cooper
192	ANTaR Redcliffe
193	Ms Margaret Walker
194	Ms Hannah Robert
195	Mr Adil Safwan Zabalawi
196	Western Australian Equal Opportunity Commission
197	The Torch Project
198	Mr Peter D McIntosh
199	Mr Stephen Roberts
200	Ms Monique Bond
201	Ms Joan Pearson
202	Racial Respect Inc.
203	Manduka Community Settlement Cooperative
204	Dr Jennifer Tannoch-Bland
205	Ms Judy Pine
206	Multicultural Disability Advocacy Association of NSW
207	Disability council of New South Wales
208	Ms Loelle Forrester
209	Ms Jessie Duthie
210	Australian Education Union
211	NetAct
212	Reconciliation Queensland Incorporated
213	Queensland Advocacy Incorporated
214	Federation of Community Legal Centres (Vic) Inc
215	Villamanta Legal Service Incorporated
216	Victorian Bar Council
217	National Legal Aid
218	Ethnic Communities' Council of Victoria Inc
219	The Dalby Social Justice Circle
220	Australians for Native Title and Reconciliation (Vic) Inc.
221	Law Council of Australia

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Tuesday 29 April, 2003

Human Rights and Equal Opportunity Commission
Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner
Dr Sev Ozdowski OAM, Human Rights Commissioner
Ms Diana Temby, Executive Director
Ms Susan Roberts, Director, Legal Services
Ms Rocky Clifford, Director, Complaint Handling
Ms Jan Payne, Director, Public Affairs and Education

NSW Bar Association
Mr Bret Walker SC, President

Gilbert & Tobin Centre of Public Law, UNSW
Ms Ronnit Redman, Lecturer

ACOSS
Mr Andrew McCallum, President
Mr Philip O'Donoghue, Deputy President
Ms Cassandra Goldie, Law & Justice Policy Adviser

WEL and Women's Economic Think Tank
Ms Eva Cox

National Ethnic Disability Alliance
Ms Lou-Anne Lind, Executive Director

Multicultural Disability Advocacy Association of NSW
Ms Maureen Kingshott, Deputy Director

Systemic Advocate, Multicultural Disability Advocacy Association of NSW
Ms Christina Ricci

Public Interest Advocacy Centre
Ms Andrea Durbach, Director
Ms Annie Pettit, Policy Officer
Mr Simon Moran, Principal Solicitor

Jumbunna Indigenous House of Learning
Mr Jason Field, Research and Policy Coordinator
Ms Robynne Quiggin, Research Consultant

Ethnic Communities' Council of NSW Inc
Mr Ian Lacey, Honorary Consultant

NSW Council for Civil Liberties
Mr Jeremy Styles, Secretary

UNSW Council for Civil Liberties
Mr Michael Walton

Canberra, Wednesday 14 May, 2003

Attorney-General's Department
Ms Amanda Davies, Assistant Secretary, Human Rights Branch, Civil Justice Division
Ms Toni Fredrica Dawes, Principal Legal Officer, Civil Justice Division
Ms Katherine Leigh, First Assistant Secretary

APPENDIX 3

HREOC Guidelines on applications for interventions in Court proceedings

The Commission may intervene in court proceedings in a criminal or civil jurisdiction subject to the following guidelines:

1. The Commission may intervene in any case in which its intervention is permitted, sought or required by the courts.

2. The proceedings should involve the rights of one or more persons who are within the jurisdiction of an Australian court, or in a foreign court with a connection to Australian jurisdiction.

3. The proceedings must involve "intervention issues". These are issues of:

(a) human rights (as defined in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth));

(b) discrimination in employment (as defined in the Human Rights and Equal Opportunity Commission Act and the *Industrial Relations Reform Act 1993* (Cth)),

(c) racial discrimination (as defined in the *Racial Discrimination Act 1975* (Cth));

(d) discrimination on the ground of sex, marital status, pregnancy or family responsibilities or discrimination involving sexual harassment (as defined in the *Sex Discrimination Act 1984* (Cth)); or

(e) discrimination on the ground of disability (as defined in the *Disability Discrimination Act 1992* (Cth)).

4. The intervention issues should be significant and not peripheral to the proceedings.

5. The Commission should put the intervention issues before the court only if these issues are not proposed to be put before the court by the parties to the proceedings or not adequately or fully so argued.

6. Notice of intention to seek leave to intervene in the proceedings should be given to the parties prior to the hearing with an indication of the intervention issues intended to be argued. In the event that a party then decides to fully raise or adopt the proposed intervention issues, the Commission will only press its application to intervene if the party then decides not to argue those proposed intervention issues, or if the party particularly seeks the support of the Commission (in such cases submissions in written form may be sufficient).

7. Notice of the Commission's intention to seek leave to intervene (and reasons why the Commission considers it reasonable to do so) must be given to the Attorney-General's office and the Manager of the Human Rights Branch of the Attorney-General's Department as soon as practicable after the Commission has decided to apply to intervene in the proceedings.

APPENDIX 4

THE PARIS PRINCIPLES

[These principles were endorsed by the United Nations Commission on Human Rights in March 1992 (resolution 1992/54) and by the United Nations General Assembly in its resolution A/RES/48/134 of 20 December 1993.]

Principles Relating to the Status of National Institutions

Competence and Responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

   (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

      (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

      (ii) Any situation of violation of human rights which it decides to take up;

      (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

4. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

5. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

6. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

(a) 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 members or of any petitioner;

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);

(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combatting racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-judicial competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

APPENDIX 5

SUMMARY OF COMMISSION INTERVENTIONS

YEAR	NO. OF CASE	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
1988	1.	**Re A Teenager (1988)** 94 FLR 181	Family Law - Sterilisation of a young woman with a disability	Family Court
1991	2.	**Secretary, Department of Health and Community Services v JWB & SMB** **(In re Marion (No.1))** (1992) 175 CLR 218	Family Law - Sterilisation of a young woman with a disability	Family Court
1992	3.	**Mount Isa Mines Ltd v Marks** (1992) 35 FCR 96	Employment Law - OH&S issues	Full Federal Court
	4.	**R v Cheung,** Unreported, Badgery-Parker J, 26 November 1992	Criminal Law – Right to a fair trial	NSW Supreme Court
1994	5.	**Re Michael: John Briton, Acting Public Advocate (Victoria) v GP and KP and the Human Rights and Equal Opportunity Commission** (1994) FLC 92-486	Family Law – Consent to surgical treatment	Family Court
	6.	**ZP & PS** (1994) 68 ALJR 554	Family Law - Abduction of a child	High Court
	7.	**Minister of State for Immigration and Ethnic Affairs v Teoh** (1995) 183 CLR 273	Family Law - Deportation of the father of seven children	High Court

YEAR	NO. OF CASE	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
	8.	**P & P: In the Matter of; Legal Aid Commission of New South Wales,** Unreported, Moore J, 23 September 1994; **P & P: In the Matter of; Legal Aid Commission of New South Wales** (1995) FLC 92-615	Family Law – Sterilisation of a young woman with a disability	Family Court Full Family Court High Court
	9.	**In re Marion (No.2)** (1994) FLC 92-448	Family Law - Sterilisation of a young woman with a disability	High Court
1995	10.	**C, LJ & Z v Minister for Immigration and Ethnic Affairs**, Unreported, O'Loughlin J, 30 March 1995; **Long Guan Chun, Li Liu Ying & Long Guan Juan v Minister for Immigration, Local Government & Ethnic Affairs** (1996) 136 ALR 303	Refugee Law – 'One child policy' of the Peoples Republic of China	Federal Court Full Federal Court
	11.	**Wu Yu Fang & Ors v Minister for Immigration & Ethnic Affairs,** FedCt(NT) DG4/95 **Wu Yu Fang v Minister for Immigration and Ethnic Affairs and Commonwealth of Australia** (1996) 64 FCR 245	Refugee Law - Access to lawyers by persons in detention	Federal Court Full Federal Court
	12.	**Re: Katie** (1996) FLC 92-659	Family Law -Sterilisation of a young woman with a disability	Family Court

YEAR	NO. OF CASE	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
1996	13.	**Albert Langer v Australian Electoral Commission** (1996) 186 CLR 302	Electoral Law – Freedom of political speech	Full Federal Court
	14.	**Rodney Croome & Nicholas Toonen v The State of Tasmania** (1997) 71 ALR 397	Constitutional Law-Alleged inconsistency between State and Federal legislation	High Court
1997	15.	**In the matter of: B v B: Family Law Reform Act 1995** (1997) No.TV 1833 of 1996	Family Law – Relocation of mother and children away from father	Full Family Court
	16.	**Qantas Airlines Limited v John Christie** (1998) 193 CLR 280	Employment Law- Meaning of 'inherent requirements'	High Court
1998	17.	**Kartinyeri v The Commonwealth of Australia** (1997) 152 ALR 540	Constitutional Law- The race power in s 51(xxvi) of the Constitution	High Court
	18.	**Death of Andrew Ross**	Coronial inquest -Death of indigenous youth in custody	Commission granted leave to appear as *amicus curiae* rather than as intervener.

YEAR	NO. OF CASE	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
2001	19.	**Western Australia v Ward** (2002) 191 ALR 1	Native Title Law -Definition of native title rights	High Court
	20.	**Ming Dung Luu v Minister for Immigration and Multicultural Affairs** [2001] FCA 1136**; Luu v Minister for Immigration Multicultural Affairs** [2002] FCAFC 369	Refugee Law – Criminal deportation	Federal Court Full Federal Court
	21.	**Victorian Council for Civil Liberties Incorporated & Vardalis v Minister for Immigration & Multicultural Affairs & Ors** [2001] FCA 1297**; Minister for Immigration & Multicultural Affairs & Ors v Vardalis & VGCCL** [2001] FCA 1329**; Vardalis v Minister for Immigration & Multicultural Affairs & Ors –** M93/2001 (27 November 2001) (Special leave application to High Court of Australia)	Refugee Law – Tampa litigation	Federal Court Full Federal Court High Court
	22.	**(IVF Case) Re McBain: Ex parte Australian Catholic Bishops Conference** [2002] HCA 16	Constitutional Law-Standing and sex discrimination legislation	High Court
2002	23.	**Rainsford v State of Victoria** [2002] FMCA 266	Discrimination Law – Application of the *Disability Discrimination Act 1992* (Cth) to the States	Federal Magistrates Court
	24.	**Attorney-General for the Commonwealth v Kevin and Jennifer** [2003] FamCA 94	Family Law – Right of people with a transsexual history to marry.	Full Family Court

YEAR	NO. OF CASE	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
	25.	**Peter Martizi and Simon Odhiambo v Minister for Immigration and Multicultural Affairs** [2002] FCAFC 194	Refugee Law – Guardianship of unaccompanied minors	Full Family Court High Court
	26.	**(Pay Equity Case) AMWU v Gunn & Taylor** (2002) EOC 93-225	Employment Law –Pay equity for casual employees	Australian Industrial Relations Commission
	27.	**Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors** (2002) 194 ALR 538	Native Title Law- Concept of 'abandonment' of native title	High Court
	28.	**NAAV v Minister for Immigration and Multicultural Affairs** [2002] FCAFC 228	Refugee Law – Privative clause amendments	Full Federal Court
	29.	**Alsiddig Mohammed** [Decision not publicly available]	Refugee Law – '*sur place*' amendments to *Migration Act 1958* (Cth)	Refugee Review Tribunal
	30.	**Song v Ainsworth Games Technology** [2002] FMCA 31	Discrimination Law - Family responsibilities and flexible work hours	Federal Magistrates Court

YEAR	NO. OF CASE	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
	31.	**Graincorp Operations Ltd v Markham** (2003) EOC 93-250	Employment Law – Sexual harassment	Australian Industrial Relations Commission
	32.	**S134/ 2002 v Minister for Immigration and Multicultural Affairs** (2003) 195 ALR 1	Refugee Law – Privative clause amendments	High Court
	33.	**Minister for Immigration, Multicultural and Indigenous Affairs v VFAD** [2002] FCAFC 390	Refugee Law – Power to detain under s 196 of the *Migration Act 1958* (Cth)	Full Federal Court
	34.	**Al Masri v Minister for Immigration, Multicultural and Indigenous Affairs,** No. S202/2002, appeal heard by Full Court of Federal Court on 2 October 2002 (Decision reserved).	Refugee Law – Power to detain under s 196 of the *Migration Act 1958* (Cth)	Full Federal Court
	35.	**Death of Nurjan and Fatimeh Husseini**	Coronial inquest – Death of "unlawful non-citizens" at sea	WA Coroner's Court

APPENDIX 6

CASES WHERE HREOC'S SUBMISSIONS DIFFERED MATERIALLY FROM THOSE OF THE COMMONWEALTH

(From HREOC's answers to questions on notice, 8 May 2003)

'HREOC has made submissions that differed materially from those of the Commonwealth on a point of human rights law or principle in 16 matters in which the Commonwealth has been a party and HREOC has intervened.

Those matters are:

(i) Legitimate expectation that administrative decision makers will treat the rights of child as a primary consideration in decisions that affect children:

Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.

(ii) "One child policy" of People's Republic of China as ground for seeking asylum:

C, LJ & Z v Minister for Immigration and Ethnic Affairs, Unreported, O'Loughlin J, 30 March 1995 (and on appeal *in Long Guan Chun, Li Liu Ying & Long Guan Juan v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 136 ALR 303).

(iii) Access to lawyers by asylum seekers in detention:

Wu Yu Fang & Ors v Minister for Immigration & Ethnic Affairs, FedCt(NT) DG4/95 (and on appeal in *Wu Yu Fang v Minister for Immigration and Ethnic Affairs and Commonwealth of Australia* (1996) 64 FCR 245.

(iv) Relocation of custodial mother and children away from non-custodial father:

In the matter of: B v B: Family Law Reform Act 1995 (1997) No.TV 1833 of 1996.

(v) Race power in s51(xxvi) of the Constitution:

Kartinyeri v The Commonwealth of Australia (1997) 152 ALR 540.

(vi) Definition of native title rights:

Western Australia v Ward (2002) 191 ALR 1.

(vii) Criminal deportation of person in immigration detention:

Ming Dung Luu v Minister for Immigration and Multicultural Affairs [2001] FCA 1136 (and on appeal in *Luu v Minister for Immigration Multicultural Affairs* [2002] FCAFC 369).

(viii) Detention of persons aboard MV Tampa:

Victorian Council for Civil Liberties Incorporated & Vardalis v Minister for Immigration & Multicultural Affairs & Ors [2001] FCA 1297 (on appeal in *Minister for Immigration & Multicultural Affairs & Ors v Vardalis & VGCCL* [2001] FCA 1329 and special leave application to High Court of Australia in *Vardalis v Minister for Immigration & Multicultural Affairs & Ors,* M93/2001 (27 November 2001)).

(ix) Right of person with transsexual history to marry:

Attorney-General for the Commonwealth v Kevin and Jennifer [2003] FamCA 94.

(x) Guardianship of unaccompanied minors in immigration detention:

Peter Martizi and Simon Odhiambo v Minister for Immigration and Multicultural Affairs [2002] FCAFC 194;

(xi) Concept of "abandonment" of native title:

Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors (2002) 194 ALR 538;

(xii) Privative clause in Migration Act 1958:

NAAV v Minister for Immigration and Multicultural Affairs [2002] FCAFC 228.

(xiii) Privative clause in Migration Act 1958:

S134/ 2002 v Minister for Immigration and Multicultural Affairs (2003) 195 ALR 1.

(xiv) Power to detain under s196 of Migration Act 1958:

Minister for Immigration, Multicultural and Indigenous Affairs v VFAD [2002] FCAFC 390;

(xv) Power to detain under s196 of Migration Act 1958:

Al Masri v Minister for Immigration, Multicultural and Indigenous Affairs, [2003] FCAFC 70 (15 April 2003);

(xvi) Death of asylum seekers off Ashmore Reef:

Record of Investigation into Deaths of Nurjan Husseini and Fatimeh Husseini, Coroners Court of WA, Ref No 29/02 (13 December 2002).'