24 April, 2003

Mr Peter Hallahan
Secretary,
Senate Legal and Constitutional Committee
Room S1.61
Parliament House
CANBERRA ACT 2600

Dear Secretary,

I would like to make the following submission to the Senate Legal and Constitutional Committee Inquiry into the proposed Australian Human Rights Commission Legislation Bill 2003 (the 'AHRC Bill') on behalf of the Australian Human Rights Centre at The University of New South Wales, of which I am Director.

The Australian Human Rights Centre is concerned about a number of provisions in the proposed legislations which it believes will erode the protection of human rights in Australia. As the following submission makes clear, it is particularly concerned about:

1. Provisions that affect the ability of the Commission to intervene in court proceedings.

2. Provisions affecting the Commission's ability to recommend compensation or damages payments.

3. Provisions replacing the current five specialist Commissioners with three Human Rights Commissioners.

4. Provisions concerning the newly created 'Complaints Commissioners'

In registering the concern of the Australian Human Rights Centre at the proposed legislation, I would also like it known that I, or a member of the Committee of the Australian Human Rights Centre, would be available to the Senate Legal and Constitutional Committee should it consider it necessary to question us further about the grounds of our concern or the content of our submission.

Yours faithfully,
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Australian Human Rights Centre

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

2 Introduction

The Australian Human Rights Centre wishes to make submissions on the following provisions of the Australian Human Rights Commission Legislation Bill 2003 (the 'AHRC Bill'):

1. Provisions that affect the ability of the Commission to intervene in court proceedings.
2. Provisions affecting the Commission's ability to recommend compensation or damages payments.
3. Provisions replacing the current five specialist Commissioners with three Human Rights Commissioners.
4. Provisions concerning the newly created 'Complaints Commissioners'.

2 Summary of submissions

2.1 Submissions on the Intervention Power

The Australian Human Rights Centre submits that provisions of the AHRC Bill affecting the Commission's power to intervene should not be enacted because the provisions:

- compromise the independence of the Commission;
- breach the doctrine of separation of powers;
- allow the possibility of Governmental conflict of interest;
- do not provide a transparent process for decisions under the provisions; and
- allocate the task of determining when a case involves human rights issues to a body without the relevant expertise.

In addition, the Australian Human Rights Centre submits that there is no pressing need for the provisions to be enacted because:

- there is no 'duplication of resources' currently, in that the Commission intervenes only when the issues it raises would not otherwise be raised;
- the *amicus curiae* role of the Commission is not an appropriate substitute for the intervener role; and
- the Commission has used its role as sparingly as possible.

2.2 Submissions on the recommendation of damages

The Australian Human Rights Centre submits that provisions of the AHRC Bill removing the ability of the Commission to make recommendations for compensation or damages should not be enacted because the provisions compromise the Commission's role as a protector of human rights by not providing an adequate remedy for human rights abuse.

2.3 Submissions on the replacement of the specialist Commissioners with Human Rights Commissioners

The Australian Human Rights Centre submits that provisions of the AHRC Bill replacing the current specialist Commissioners with generic Human Rights Commissioners should not be enacted because the provisions:

- diminish the importance of established particular human rights and social justice causes; and
- remove expertise requirements which should still be in place to effect the adequate protection of the rights of Australian society.

In addition, the Australian Human Rights Centre submits that there is no pressing need for the provisions to be enacted because:

- the current system does not suffer from a problem of 'collegiality'; and
- there are better ways to deal with emerging human rights issues.

2.4 Submissions on Complaints Commissioners

The Australian Human Rights Centre submits that the provisions allowing for the appointment of Complaints Commissioners by the Attorney-General and the subsequent referral of complaints by the President to the Complaints Commissioners should not be enacted because the provisions violate the Independence of the Commission in a similar manner to the provisions on the intervention power.

3 Submissions on the Intervention Power

3.1 Independence of the Commission

The changes proposed by the AHRC Bill make the ability of the Commission to intervene in court proceedings subject to the will of the Attorney-General. In this way, an important power of the Commission ties the Commission to the government. It is suggested that this condition detracts from the independence and integrity of the Commission as an Independent Body.

The Commission's independence is required by the United Nations' Principles relating to the Status of National Institutions (the '*Paris Principles*') formulated by the UN Human Rights Commission and confirmed by General Assembly Resolution 48/134 (20 December 1993).

The *Paris Principles* provide, inter alia, that:

> 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.

The *Paris Principles* also state that if Government department representatives are included in the make up of a human rights body, that their role should be advisory only (ie, not determinative).

In light of this, we submit that the AHRC Bill infringes the spirit if not the letter of the *Paris Principles*. By making an important function of the Commission subject to executive approval, the Commission is subject to the will of the executive in a determinative fashion. Further, the AHRC Bill allows for the possibility of political control of the Commission by the executive, as the executive may use a proposed intervention as a bargaining chip in its relations with the Commission.

3.2 Separation of powers

The *HREOC Act*, both originally and in its proposed amended form, requires the court to grant leave before the Commission is allowed to intervene in proceedings. The proposed change by the AHRC Bill requires the Attorney-General to approve the intervention, before

the court may look at whether it is appropriate to grant leave. The court has never refused leave and has generally interpreted s 11(1)(o) of the *HREOC Act* quite broadly.
Under the proposed changes, the Attorney-General has guidelines to which he may, but need not, refer. This effectively gives the Attorney-General unfettered discretion to determine whether the Commission intervenes (given that the court will generally grant leave) and in doing so, effect the quality of submissions in court proceedings. This discretion seems to thus broach the court's ability to administer its own proceedings and hence infringe the doctrine of separation of powers.
It is to be noted that provisions of the AHRC Bill state that if the President of the Commission is an immediately past or current Federal judge, the approval of the Attorney-General will not be required, and this was done, according to the Second Reading Speech, to avoid potential constitutional issues arising from the appointment of a Federal judge as President. These 'constitutional issues' are separation of powers issues.[1] It is unfortunate that Parliament's concern did not extend to the role of the court in granting leave to an intervener.
It should also be noted that, if exercised, the power of the Attorney-General in this manner would at least have to be subject to judicial review pursuant to s 75(v) of the Constitution. Such proceedings could, however, be a serious practical impediment to proceedings where time is a factor.

3.3 Governmental conflict of interest

The Commonwealth is often a party in proceedings involving human rights. In recent years, the high profile Tampa litigation was one such proceeding.
For a party in proceedings to have discretionary control over whom the court may grant leave to intervene against it in those proceedings (or, for that matter, on its own side) is clearly repugnant to the notion of procedural fairness. With the added consideration that the intervention of the Commission often is the only source, or the highest quality source of submissions on human rights issues in proceedings where one party has limited resources, the injustice of the provisions is more apparent. For this reason, we submit that these provisions should be rejected, or at least amended so as not to require the Attorney-General's consent in matters where the Commonwealth is a party.

3.4 Transparency

The Commission publishes guidelines[2] which govern when it intervenes, and court reasons for granting leave to intervene are of course public documents. The AHRC Bill makes no provision for the criteria or publication of reasons by the Attorney-General. The procedure is thus less transparent and less conducive to the prevention of injustice, hardly appropriate for human rights matters.

3.5 Expertise

While it may be true that the Attorney-General 'has a general public interest role in litigation, including human rights litigation'[3] that does not qualify the Attorney-General to determine when a human rights issue has validly arisen in proceedings such that it is appropriate for the Commission to intervene. The Commission too, has a public interest role (as is required under the *Paris Principles*) and is well-equipped to make such determinations.

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[1] See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
[2] <www.humanrights.gov.au/legal/interventions_in_court_proc.html>
[3] AHRC Bill, Explanatory Memorandum.

3.6 Duplication of resources

The Second Reading Speech of the AHRC Bill contends that one function of the provisions is to prevent 'duplication and the waste of resources'. Presumably, this means that submissions by the Commission could have been, or were in substance, made by another party to the proceedings. Recent cases do not bear this out. In fact, the Commission's current Guidelines state that it may intervene '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.' Further, the courts have often acknowledged the high quality of submissions and the assistance that these submissions were to the court.

3.7 The *amicus curiae* role

In a similar Bill in 1998, it was contended that the provisions in that Bill fettering the Commission's ability to intervene would encourage the Commission to utilise its role as *amicus curiae* – a friend to the court (the *amicus curiae* role was introduced in the same batch of legislation as the 1998 Bill and was ultimately enacted in 1999).[4]

The Commission has used the *amicus curiae* role only one since its inception in 1999. The role is more limited than an intervention role. *Amici* are generally not parties to the proceedings, do not file pleadings or lead evidence and they may not lodge an appeal.[5] *Amici* also are only to appear where a case is so special that it involves a new area of the law; would clarify a disputed interpretation of the law; has significant ramifications beyond the parties to the proceedings; or may affect the human rights of a significant number of people.[6]

It is thus submitted that the *amicus curiae* role of the Commission is not an adequate substitute for the intervener role of the Commission.[7] As the Senate Legal and Constitutional Committee found in 1998, there is no pressing need to limit the circumstances in which the Commission may intervene as there is no evidence that it has abused this role.

3.8 Practical issues

The Senate Legal and Constitutional Committee in 1998 found that the Commission had not abused its power to intervene, using it 'sparingly' just 17 times in 11 years. The Commission now submits that it has used the power only 35 times. The Commission has thus used the power 18 times over the past five years, and indeed used it 13 times in 2002. Thus one might argue that the Commission is increasingly willing to intervene.

It is submitted that this is a function of particular cases that have arisen in recent years, particularly refugee cases, which accounted for 6 of the 13 interventions in 2002. In any event, the number of cases in which HREOC intervenes is still small enough to suggest that the Commission chooses its cases carefully.

It should also be noted that the courts have almost always found HREOC intervention to be of great assistance, and to deny this intervention would undoubtedly hinder the courts and allow a greater possibility of injustice.

4 Submissions on compensation recommendations

The ability to recommend compensation for damages is a function of the Commission which, it is submitted, is essential for the Commission to provide an adequate remedy in certain cases

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[4] The Human Rights Legislation Amendment Bill (No. 2) 1998.

[5] <www.humanrights.gov.au/legal/amicus_info.html>

[6] <www.humanrights.gov.au/legal/amicus_discussion.html>

[7] For a detailed discussion of these issues, see Boniface D, 'More changes proposed in addition to the changes already proposed: The Human Rights and Responsibility Commission -- a friend in need?' (1999) 5 *Australian Journal of Human Rights* 235.

of human rights abuse. This function of the Commission is upheld by Australia's international obligations. The *Paris Principles* provide that a national human rights organisation, in cases of hearing human rights disputes, may perform its function by:

> [i]nforming the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them.

While this provision of the *Paris Principles* is not a mandatory one, to remove the Commission's current ability to fulfil this function would be a step backward for protection of human rights in Australia.

Further, the International Covenant on Civil and Political Rights ('ICCPR')[8], Article 2(3) states:

> Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Here, the removal of the Commission's power to recommend compensation or damages payment removes an effective remedy that a person whose human rights have been infringed may have.

In the Explanatory Memorandum to the AHRC Bill it is explained that such infringements (unlike, eg, race discrimination) are not made unlawful by the HREOC Act (by implication, if they are unlawful in any other way, appropriate remedy will be available). However, this is no excuse for the provisions. If the Commission has found that human rights abuse has occurred, then despite the fact that the abuse may be lawful, there should be appropriate remedy. If the Commission determines that damages payment is one such remedy, it is an injustice that such remedy should be unavailable.

5 Submissions on the replacement of the specialist Commissioners with Human Rights Commissioners

5.1 Importance of Established Human Rights and Social Justice Causes

Currently, the Commission's composition of five Commissioners, each with their own area of expertise ('specialist Commissioners') reflects the importance that society and government has placed on these areas. That there are dedicated Commissioners for Human Rights, Race Discrimination, Sex Discrimination, Disability Discrimination, and Aboriginal and Torres Strait Islander Social Justice is and is seen to be an effective way of protecting the rights of Australians in these areas. These causes are well established in Australian history, and the specialist Commissioners are visible in the Australian political and legal landscape.

To abolish all these positions and replace them with three generic Human Rights Commissioners, we submit, would be a step backwards for the protection of these established human rights and social justice causes. To remove the focus placed on all these causes would be to place the focus on none. At least in form, if not in substance, the protection of human rights in Australia would suffer.

5.2 Expertise

We submit further that the protection of human rights would suffer were these provisions enacted because the requirements as to expertise for appointment to the new Human Rights

[8] (1966), 999 UNTS 171, entered into force 23 March 1976.

Commissioner positions do not reflect the particular expertise required to protect rights in any one area.

Under the current legislation, each specialist Commissioner can be appointed only if they have expertise in that particular area. For the Aboriginal and Torres Strait Islander Social Justice Commissioner, moreover, the person must have 'significant experience in community life of Aboriginal persons or Torres Strait Islanders'.[9]

Under the proposed amendments, the new Human Rights Commissioners, along with the President, will be 'required to have the collective knowledge and expertise required to cover the variety of important matters likely to come before the Commission'. We submit firstly, that 'collective expertise' of the entire Commission is harder to evaluate than the individual expertise of the specialist Commissioners. Secondly, when one Commissioner needs to be replaced, rebalancing the collective expertise of the Commission may be problematic. Thirdly, the requirement of one Commissioner to have experience in Aboriginal or Torres Strait Islander community life has been removed. Fourthly, the Commission has been truncated to three members, down from five, meaning that sum total of collective expertise is compromised in any event. Fifthly, that one of the rationales for this new structure was to allow the Commission to adapt to new areas requiring rights protection[10] and that this aim is inconsistent with pre-determining the range of matters the Commission will be able to tackle by the appointment of certain Commissioners with a limited range of expertise.

For these reasons we submit that a Commission under these provisions will be less able and qualified to protect human rights in Australia.

5.3 Collegiality

The Attorney-General's Department claims that this new structure will 'strengthen the Commission's "collegiate" approach to its work.'[11] We submit that there is no current pressing need for a 'collegiate' Commission, nor is there any evidence that a collegiate Commission would function better than the current Commission. Currently, as noted above, the specialist Commissioners are highly visible and hence are seen by the Australian public to be the watchdog of human rights in this country. We submit that this is the case only because, as individual specialist Commissioners, the Commissioners are seen to protect disaffected sectors of society. To hide the Commissioners behind the veil of collegiality would dilute the responsibility and visibility afforded to each Commissioner and is therefore not desirable.

5.4 Emerging Issues

The Explanatory Memorandum to the AHRC Bill states that the new structure allows 'emerging areas (such as age discrimination) to be addressed without the need to appoint new specialist commissioners'. We submit that the appointment of new specialist Commissioners is the only way to appropriately deal with emerging areas, especially if they are as important and diverse as the current areas. As explained above, particular expertise, not a range of general expertise, is required to be qualified to protect rights in a certain area, while particular visibility and responsibility is desired for the public perception of justice.

Further, no compelling reason as to why further specialist Commissioners being appointed is not an option. We note that emerging areas still require their own legislation (eg, the proposals of Age Discrimination legislation currently being discussed).

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[9] HREOC Act, s 46B.

[10] See AHRC Bill, Explanatory Memorandum.

[11] Attorney-General's Department, 'Australian Human Rights Commission Bill' <nationalsecurity.ag.gov.au/www/attorneygeneralHome.nsf/Web+Pages/C95ADE90CA635AF5CA256CF6001239AE?OpenDocument#content>

5 Submissions on Complaints Commissioners

We submit that the introduction of Complaints Commissioners under the AHRC Bill compromises the independence of the Commission, and hence should not be enacted for the same reasons as detailed in our paragraph 3.1. The Complaints Commissioners provided for under the AHRC Bill are appointed by the Attorney-General and do not need to have experience or qualifications in human rights, but merely legal qualifications. Thus it seems likely that the only function of the Complaints Commissioners will be, not the protection of human rights, but the promotion of the Executive's point of view on human rights matters.
While it is true that the President of the Commission is not required, under the AHRC Bill, to have recourse to delegate complaints proceedings to the Complaints Commissioners, we submit that the independence of the Commission is still abrogated by the appointment of the Complaints Commissioners, and thus the provisions should not be enacted.