

**Clifford, Julia (SEN)**

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**From:** Dorian@melbourne.catholic.org.au  
**Sent:** Thursday, 24 April 2003 4:03 PM  
**To:** Legal and Constitutional, Committee (SEN)  
**Subject:** Att: John Leigh: Draft Submission on the Australian Human Rights Commission



Submission to  
Senate on Aust H...

Dear John,

Please find attached a draft submission from the Catholic Commission for Justice Development and Peace Melbourne on the Australian Human Rights Commission Bill 2003. As discussed with you earlier this week, we will submit a final submission early next week, but the substance of our main points are contained in this draft. As indicated, we very much want to speak to our concerns to the Committee and we would be prepared to travel to Canberra or Sydney as we believe that the changes proposed in the Bill would seriously undermine the independence of the Commission.

Kind regards

(See attached file: Submission to Senate on  
Aust HR Commission Bill 2003.doc) Marc Purcell Executive Officer Catholic Commission  
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CATHOLIC COMMISSION FOR  
**JUSTICE,  
DEVELOPMENT  
& PEACE**  
MELBOURNE



**Submission to the Senate Legal and Constitutional  
Committee's Inquiry into the Provisions of the  
Australian Human Rights Commission Legislation Bill  
2003**

**Catholic Commission for Justice Development and  
Peace (Melbourne)**

**April 2003**

## 1. Introduction

The Catholic Commission for Justice, Development and Peace (CCJDP) Melbourne aims to help educate and give leadership to the Catholic and wider community in the Gospel message of justice and in the social teachings of the Church in areas of public policy. The CCJDP Charter requires the CCJDP work for justice in public, local and national structures. It seeks to achieve these ends through research, analysis, working with parish networks, public forums, in schools and in the media. The CCJDP's role is also to prepare submissions and make representations to government, politicians, public inquiries and other agencies. It monitors development and implementation of social policy as it affects social justice and performs an advocacy role on a variety of social justice issues.

In addition to supporting the promotion of and respect for universal human rights and standards that will be referred to throughout this submission, the CCJDP uses the principles of Catholic social teaching to test the justness of public policy.<sup>1</sup> These principles include:

- The state must act, within the limits of the principle of subsidiarity, to ensure that all people have adequate food, clothing, shelter, education;
- Justice must be enacted in a spirit of love to create a society marked by genuine solidarity;
- The social nature of human beings, created in the image of a loving God;
- The Gospel imperative to love one's neighbour, especially those in need;
- The end of all social arrangements is to enhance the human dignity of individuals;
- Each person has rights to share in and duties to contribute to the common good; and
- Each person must have the necessary resources to fulfill their social responsibilities;

The Pope asserts the primacy of human rights and has voiced his concern about States having "contempt for the fundamental human rights of so many people,

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<sup>1</sup> For example Catholic social teaching is concerned that public policy does not undermine the primacy of the family: "[T]he individual, the family and society are prior to the State, and...the State exists in order to protect their rights and not stifle them." Catholic Social Welfare, Australian Catholic Social Welfare Commission, Vol.1, No.1, July 1992.

especially children...".<sup>2</sup> Promotion and respect for human rights has become a greater imperative in a society operating, more and more, on market principles:

*The ethical and juridical regulation of the market seems more difficult than ever, since the measures taken by individual States prove increasingly inadequate. It is therefore necessary to work for a culture of norms that not only concern the commercial aspects, but take responsibility for defending human rights all over the world.*<sup>3</sup>

CCJDP maintains the Australian Human Rights Register which receives reports from various community organisations and tracks reports in the media of incidents where people have suffered positive or negative developments in respect of their human rights. Over three hundred reports were received in 2002. The Register paints a complex and sometimes bleak picture illustrating that the Government often ignores the human rights of people, and is the main violator of people's human rights in Australia. However, the Register - while necessarily incomplete – provides a report card of where the Government can do better in respecting and promoting human rights, and should be seen as useful tool towards this end. A copy of the Register has been enclosed and can be viewed at [www.ccjdp.org](http://www.ccjdp.org)

On a more positive note there is a growing awareness in the community sector of the importance of community education in human rights and a number of community initiatives are occurring around the country, including the formation of the Human Rights Alliance of Australia – a group of NGOs and some statutory bodies concerned to champion human rights and community awareness, the new Council of Australian Human Rights Agencies, comprising state based statutory bodies concerned with human rights and discrimination; and the Australian Human Rights Project which is conducting an audit of human rights in civil society. All this bodes well and CCJDP is happy to explain further the nature of some of these initiatives at public hearings.

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<sup>2</sup> John Paul II *Novo Millennio Ineunte: At the Beginning of the New Millennium*, Strathfield, 2001, p.68.

<sup>3</sup> Address to the Members of the Vatican Foundation "Centesimus Annus – Pro Pontific" 9 May 1998.

## 2. Concerns about Australian Human Rights Commission Legislation Bill 2003

The CCJDP holds grave concerns about some aspects of this Bill.

The *Human Rights and Equal Opportunity Act 1986* recognised that the protection and advancement of human rights in this country required a multi-faceted approach, not one confined to education and information dissemination. It also included a capacity for the Human Rights and Equal Opportunity Commission (HREOC) to:

- i) deal with individual complaints;
- ii) conduct systematic inquiries into areas of injustice such as homelessness and mental illness;
- iii) monitor policy approaches and protocols within business and foster community responsibility;
- iv) Ensure that governments and their instrumentalities act to ensure the protection of the human rights and dignity of all its citizens and in compliance with international obligations.

CCJDP has several concerns about the Bill:

- the requirement for the new Australian Human Rights Commission ("AHRC") to seek approval from the Attorney-General before intervening in court proceedings;
- the abolition of portfolio Commissioners;
- the responsibility for education about human rights and where this responsibility begins;
- the inserting of a 'responsibilities' marketing slogan by legislation and
- removing the AHRC's power to recommend payment of damages following certain inquiries.

The CCJDP has also kept its comments brief in recognition of the fact that it has already had cause to make a submission to this Committee during its earlier inquiry and subsequent report on the provisions of the *Human Rights Legislation Amendment Bill (No 2) 1998*. It is disappointing that some changes that were proposed in 1998 are being mooted again by the Government and while cognizant of the fact that the Government regulates the statutory body, the CCJDP respectfully suggests that the Government pay heed to the adage, "if it ain't broke, don't fix it." The Human Rights and Equal Opportunity Commission (HREOC) do not support

several of the proposed changes and CCJDP supports the statutory body's stance for the reasons outlined below.

The capacity of the Commission has already been sorely undermined by the Government's budgetary cuts in the mid 1990s and these proposals contained in the bill do little to assist the Commission in its work, and do much to undermine its role as an impartial, fearless protector and investigator of human rights violations and discrimination in our community.

### **3. Increased Powers of the Attorney General over the Commission**

CCJDP believes that the proposal that the renamed Australian Human Rights Commission should obtain approval from the Attorney-General, prior to intervening in court proceedings, runs the risk of creating a conflict of interest in cases where the Government is involved. It also smacks of political interference in the impartial role of the Commission. Such a proposed gatekeeper role for the Attorney General is not in keeping with the spirit or the letter of the Principles Relating to the Status of National Institutions - Competence and Responsibilities – the so-called *Paris Principles*. The *Paris Principles* stipulate that a national human rights body must be able to:

*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.*

The CCJDP draws the Committee's attention to the emphasis that the Foreign Minister Alexander Downer places on the Paris principles, as a "set of minimum standards for such institutions" and that he observes that "many governments...are now looking positively at independent national institutions as an important means to promote and protect human rights."<sup>4</sup> A question raised by the current Bill, however, is whether the Australian Government is really committed to the independence needed for a truly effective human rights institution.

The Attorney General, in his second reading speech, asserts that "this requirement is not intended to prevent court submissions that are contrary to the government's views"<sup>5</sup>. However the proposed change would mean that the Commission would have

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<sup>4</sup> Minister for Foreign Affairs, Alexander Downer, Speech to the UN General Assembly, New York, 3 October 1997.

<sup>5</sup> Second reading speech for the *Australian Human Rights Commission Legislation Bill 2003*, 27<sup>th</sup> March 2003.

had to have sought the Attorney General's permission to intervene in the Tampa case when it was considered by the Federal Court, and it was known that the Commission was arguing that the Government was violating human rights in the Tampa crisis. A requirement of the Attorney General's approval would raise a conflict of interest.

The Attorney General states that this mechanism is necessary to ensure the broader interests of the community are being served by the Commission intervening. CCJDP demurs – the courts are the best judges of what is in the community's interest in regards to a particular case; and we disagree strongly with the Attorney General being made arbiter of community interest. Grounds for this latter point are provided by the Attorney General himself, who has stated, "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."<sup>6</sup>

CCJDP reminds the committee of the main thrust of its submission in 1998 (and the points of other submissions to that Inquiry), that:

- There is no evidence of abuse by the Commission of its power;
- The amendments threaten HREOC's independence and many constitute a conflict of interest for the Attorney General;
- HREOC intervention in court proceedings is of assistance to the courts; and
- It is the courts' role to determine who may intervene.

Similarly, CCJDP believes it is for the HREOC and the courts to decide whether it is better for the Commission to participate by either an intervention or as an *amicus curiae* and this should be done by careful consideration on a case by case basis. Finally the CCJDP reminds the Committee of its own recommendation on this proposal in 1998, "that the Commission's intervention power remains free of the need for approval by the Attorney General." CCJDP would be shocked and gravely concerned if the Committee was now to reverse its earlier sage position.

#### **4. Structure of the Commission**

The proposed bill also alters the structure of the Commission - changes which are not supported by the Commission itself. The rationale for making the changes is

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<sup>6</sup> Paper entitled 'Who speaks for the courts?' presented by the Attorney General to the Courts in a Representative Democracy Conference, September 1995, p.8.

weak and a more convincing case needs to be made before the CCJDP would accept the changes as necessary. It is disappointing that the Committee ignored the majority community view made on this matter in submissions in 1998. We trust that the Committee will be more attuned to community views this time round.

Thematic Commissioners have been outstanding in their role in community education. Pat Dodson as Aboriginal and Torres Strait Islander Social Justice Commissioner, and Bill Jonas as Race Discrimination Commissioner are two examples. Individuals strongly identified with particular areas of fighting discrimination are required with specific portfolios to allow them to speak out with authority. The thematic commissioners perform an invaluable role in helping the community to understand that discrimination does occur in our society, and that discrimination occurs in particular areas where certain groups are often severely 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 public debate.

Moreover the CCJDP is specifically and deeply opposed to the abolition of the portfolio of the Aboriginal and Torres Strait Islander Social Justice Commissioner, and sees this move as a retrograde step which will further bury Reconciliation. The scrapping of this crucial commissioner would send strong signals for all the wrong reasons to the Aboriginal Community and the wider Australian public. Again, it will be highly counter-productive to the Bill's stated aim of improving community education.

##### **5. Education function.**

Education of the community about human rights is critical, but it should not be at the expense of the Commission's powers to investigate complaints, intervene in matters of human rights considered by the courts, and champion those who have had their rights violated by the Government. The Government has given only \$20,000 to the National Human Rights Education Committee for its national work for the Decade of Human Rights Education, so the Commission's role is essential. The bill proposes that the Commission would be "promoting responsibility to respect rights". The responsibility for respecting rights starts at home. CCJDP believes this responsibility



would be best exercised, in the first instance, to parliamentarians and more particularly Government. This is because it is Government which has signed successive international treaties agreeing to respect and promote human rights, and it therefore bears the primary responsibility for upholding these principles. In fact the High Court's 1995 *Teoh* decision, that there is a legitimate expectation that administrative decision-makers take into account human rights treaties ratified by the Australian Government, remains the law of the land.

CCJDP proposes two sets of applicable criteria which would assist the Parliament with its "responsibility to respect rights". One is a responsibility to uphold ethical standards in public life, best articulated in the WA Inc Report as the integrity principle, which is:

*If the trust owed to the public by our institutions and officials is to be practised in reality, and if the public is to be able to place its confidence in those institutions and officials, reassurance beyond mere words is imperative. There must be, and be seen to be, integrity in the processes and practices of government...[T]here must be, and be seen to be, integrity in the conduct of public officials.<sup>7</sup>*

CCJDP proposes that the Committee consider recommending that the Bill be amended to contain acknowledgment of standards set out in the UK Nolan Committee's report on standards in public life.<sup>8</sup> The seven principles of the Nolan Committee were:

1. **Selflessness.** Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
2. **Integrity.** Holders of public office should not place themselves under any financial or other obligations to outside individuals or organizations that might influence them in the performance of their official duties.
3. **Objectivity.** In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

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<sup>7</sup> WA Inc Report, Part II, Sec, 4.1.2.

<sup>8</sup> [www.offical-docu,emts.co.uk.document.parliament/nolan.htm](http://www.offical-docu,emts.co.uk.document.parliament/nolan.htm)

4. **Accountability.** Holders of public office are accountable for their decision and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
5. **Openness.** Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
6. **Honesty.** Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
7. **Leadership.** Holders of public office should promote and support these principles by leadership and example.

Secondly, CCJDP suggests that the Government, parliamentarians and public decision makers have a responsibility to take into account human rights treaties and international best practice in human rights (as outlined in various UN guidelines) when drafting laws or making administrative decisions. In regards to the Government and parliament's responsibility to respect rights in its deliberations and decision making, CCJDP proposes that the Committee consider recommending that the Bill be amended to include the following principles:

1. The international community has long recognised that the need to protect and preserve the principles of dignity, equality and human rights which belong to everyone.
2. This is reflected in a number of international human rights instruments that the Commonwealth has ratified, including –
  - The International Convention on the Elimination of All forms of Racial Discrimination.
  - The Convention on the Elimination of All forms of Discrimination Against Women
  - The International Labour Organisation Convention No.111 – Discrimination (Employment and Occupation)
  - The International Labour Organisation Convention No. 156 – Workers with Family Responsibilities
  - The International Covenant on Civil and Political Rights
  - The International Covenant on Economic, Social and Cultural Rights
  - The Convention on the Rights of the Child

- The Declaration on the Rights of the Mentally Retarded Persons
  - The Declaration on the Rights of Disabled Persons.
3. The Parliament should reaffirm its commitment to these ratified international instruments, and in order to fulfil its responsibility to promote and respect human rights, will extend the effect of these treaties by bringing those not already under domestic legislation into domestic law by progressive Acts of Parliament, beginning with the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
  4. Legislators and administrative decision makers must take into account the International Bill of Rights ie. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, when making decisions and drafting legislation.

### **Marketing Slogans**

CCJDP respectfully submits that by attempting to bring into use the slogan "Human Rights, everyone's responsibility" by legislation, that an unfortunate precedent is being set. Marketing should not be conducted by law. It is an internal matter for the Commission, best kept to its strategy for promotion of its activities.

Secondly the entire concept of human rights and responsibilities is a debate within human rights discourse. Neo-conservatives in the US make critiques of rights and praise duties and responsibilities. Carl Sunstein, for example, argues:

*A final and especially prominent objection in that the emphasis on rights tends to crowd out the issues of responsibility. In American law and in American public discourse, some critics complain, it is too rare to find the idea that people owe duties to each other, or that civic virtue be cultivated, prized and lived. Rights, and especially new protection of rights since the 1960s, are said to be a major problem here.<sup>9</sup>*

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<sup>9</sup> Carl Sunstein, 'Rights and their Critics', 70 Notre Dame Law Review, (1995), p.730. cited in Steiner and Phillip Alston, International Human Rights in Context: Law, Politics and Morals, Oxford, 2000, p.333.

The citation shows that this is a debate within moral philosophy about the nature of rights.

There are parallels with this debate and the debates in our society about 'mutual obligation'; a policy based on the notion that there exists a social contract between people who are disadvantaged and the state. Welfare benefits are conditional on people doing something in return, it is argued. The Final Report of the Government's Welfare Reform Group argued that welfare recipients should expect to participate in some form of economic activity if they are to continue to receive benefits.<sup>10</sup> By encouraging participation the Report seeks to ensure that the bonds of society are maintained and strengthened. These bonds, it is suggested, confer obligations as well as rights, are now implemented through the Social Security programs like 'Work for the Dole'. The 'Work for the Dole 2000' tender document states that participants are to develop "work habits" or generic work skills such as working independently, as part of a team or improving their communication skills.<sup>11</sup>

However critics of mutual obligation, and of the notion that receiving welfare is obligation generating make the following points:

- Do people who receive a welfare benefit actually have much choice in the matter? If they do not, then it is a poor basis for an obligation-generating contract.
- The notion of a social contract around mutuality between the state and the individual is fraught. Jeremy Moss argues:

*What are we to make of the idea of a social contract between citizens, especially those who are disadvantaged, and the state? Crucially how is this contract obligation –generating? My suggestion is that, with a few exceptions, the mutuality is predominantly on the part of the unemployed and not of business and government.*<sup>12</sup>

Similarly when we are judging societal responsibilities as implied in the proposed logo for the Commission, who is doing the judging? What criteria are being used? If we are implying that all people have responsibilities equal to their rights, how do we equate this with the responsibilities of a politician, or an employer who clearly have much more power in society than some one who lives on the margins of society? Are

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<sup>10</sup> Department of Family and Community Services [FACS], Final Report of the Reference Group on Welfare Reform: Participation Support for a More Equitable Society, Canberra, 2000.

<sup>11</sup> Department of Employment, Workplace Relations and Small Business, Work for the Dole 2000 Request for Tender: Community Work Coordinators, Canberra, 2000, p.4.

<sup>12</sup> Jeremy Moss, "the Ethics and Politics of Mutual Obligation", The Australian Journal of Social Issues, Vol. 36, #1, Feb 2001.

we implying that the Government minister's responsibility for respecting human rights is no different from an unemployed 18-year-old, or an impecunious asylum seeker surviving in the community or an indigenous woman in an isolated community rife with social problems?

The question remains why is the Commission having this concept inserted into its title? Will it come with concomitant powers to investigate those who have not been responsible? As mentioned, this irresponsibility in regards to failing to respect human rights is often because of Government inaction or policy and practice.

CCJDP has an in principle objection to the Government effectively taking one side in a philosophical debate for the purposes of legislatively inserting a marketing slogan into the Commission's logo and stationary. No logo's by legislation. We urge the Committee to recommend that this part of the bill not be supported.

#### **Removal of powers to award compensation**

The Government has ratified the International Covenant on Civil and Political Rights (ICCPR) and provided HREOC with powers to investigate complaints under this Covenant and others and to award compensation. The Government ought to be aware of its responsibility under this Covenant Article 2.3:

*Each State Party to the present Covenant undertakes:*

- a. To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violations has been committed by persons acting in an official capacity;*
- b. To ensure that any person claiming such a remedy shall have his rights 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.*

It is notable that the Attorney General has provided no justification for removing the Commission's power to recommend the payment of compensation. CCJDP respectfully submits that the Committee should not support this amendment without a detailed justification from the Attorney General and an opportunity then provided to

the Australian community to consider the merits of his case. The Commission has proved itself a competent administrative body in the realm of recommending awarding compensation. The cost to the general public of taking a complaint to the Commission and having their good offices in conciliation, and recommending compensation is minimal. It is expected that the cost to a citizen or other person, of going to the courts to seek redress for an alleged violation of their rights is prohibitive. The Government's proposal to remove this power not only appears to be a blatant attempt to further undermine the strength of the Commission, but would violate the spirit of Article 2.3 of the ICCPR.