

24 April 2003

Ms Louise Gell
A/Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA 2600

Dear Ms Gell

Thank you for allowing the Queensland Anti-Discrimination Commission three extra days in which to develop our full submission to the Committee on the provisions of the *Australian Human Rights Commission Legislation Bill 2003*.

Attached is an outline of our submission as requested. I will have our full submission to you by close of business on Wednesday, 30 April, 2003.

I would like also to present an oral submission to the Committee and am concerned to hear that the Committee will not be visiting Brisbane on this matter. As there is significant interest in the Bill amongst various Queensland organisations, many of which are community-based, I hope that the Committee will reconsider its schedule and find time to allow people in this State to present oral evidence. The provisions of the Bill do, after all, have serious ramifications for the human rights of people in all states.

The Committee's decision not to visit cities other than Sydney and Canberra is particularly concerning given the very short time allowed for the preparation of written submissions. Although dated 9 April, I received your letter inviting submissions on 15 April. With Easter falling shortly afterwards, this left five working days to prepare a submission outline by 24 April, at a time when many staff were obviously on leave. The extension kindly provided allows only a further three working days, with the Anzac Day public holiday falling during this period.

I would, therefore, appreciate it if you would let me know if the Committee is prepared to reconsider its schedule.

Yours sincerely

SUSAN BOOTH
Anti-Discrimination Commissioner
Queensland

Anti-Discrimination Commission Queensland

**Outline of Submission on the Australian Human
Rights Commission Legislation Bill 2003**

to the Senate Legal and Constitutional Legislation Committee

24 April, 2003

**1. Restructuring of the Human Rights and Equal Opportunity
Commission**

The Anti-Discrimination Commission Queensland (ADCQ) opposes the replacement of the identified portfolio Commissioners with three Human Rights Commissioners for the following reasons:

- a) The identified portfolio commissioner positions have been created by various commonwealth governments in response to international conventions which Australia has ratified and/or in response to domestic concerns about the disadvantage and discrimination faced by specific groups in our society. Those circumstances have not changed, particularly for indigenous people, many of whom reside in Queensland.
- b) The vast majority of complaints of discrimination and harassment received by the various Australian state and territory anti-discrimination commissions reflect the identified portfolios in HREOC, again reinforcing the fact that the portfolios have not been created on an arbitrary basis but in response to the needs of the community.
- c) The identified portfolio commissioners have provided an important focus for the work of HREOC. There will be no guarantees about how the Commission's resources will be allocated under generalist commissioners or what areas will be the focus of advocacy and educational work.
- d) The identified portfolio commissioners complement the work of the generalist commissioners appointed under state and territory anti-discrimination legislation and provide an important source of information based on the research done by the units that support them.
- e) The Attorney-General's second reading speech claims that the proposed structure "will assist the commission in reaching the broad spectrum of Australians". This implies that HREOC has been narrowly focussed. The reality is that HREOC's work has covered a very broad spectrum of human rights issues and that few Australians would not have been touched by some aspect of this work.
- f) The removal of identified portfolio commissioners reduces the possibility that any of the commissioners will be members of groups the legislation is

designed to protect (eg women, indigenous people, people with disabilities) because of the generalist nature of the new positions.

- g) The Bill removes the provision that the person appointed to the position of Aboriginal and Torres Strait Islander Social Justice Commissioner be required to have "significant experience in community life of Aboriginal persons or Torres Strait Islanders". None of the generalist Human Rights Commissioners will have to meet this requirement. As well as possibly diminishing the expertise of HREOC, this could also diminish the confidence of indigenous people in the Commission.
- h) The reduction in the number of commissioners from five to three substantially reduces HREOC's ability to do its work. The ADCQ would like to see the retention of the five commissioner positions, the immediate filling of all positions and a corresponding increase in HREOC's budget to accommodate this. The ADCQ opposes the situation that has arisen in recent years wherein the federal commissioners have performed dual roles.
- i) If the Commonwealth Government plans to introduce new or expand existing HREOC responsibilities (as mooted by the Attorney-General in his second reading speech), it should create new commissioner positions, such as a Children's Commissioner, and resource HREOC accordingly.

2. Hampering of the Human Rights and Equal Opportunity Commission's intervention capacity

The ADCQ regards the changes to HREOC's capacity to seek leave to intervene in court proceedings as a serious attack on HREOC's independence and is therefore opposed to these changes for the following reasons:

- a) The changes undermine HREOC's capacity to safeguard human rights.
- b) This changes are contrary to the United Nations' Principles Relating to the Status of National Institutions which set out international minimum standards for national human rights institutions which Australia assisted in developing (the Paris Principles, developed in October 1991 and endorsed by the General Assembly in 1993 – resolution 48/134). These principles provide that such institutions shall "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 member or of any petitioner." **Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights** produced by the United Nations' Office of the High Commissioner for Human Rights stresses the importance of independence for national human rights bodies: "There are some who see no good reason for establishing special national machinery devoted to the protection and promotion of human rights. They may argue that these bodies are not a wise use of scarce resources and that an independent judiciary and democratically elected parliament are sufficient to ensure that human rights abuses do not occur in the first

place. Unfortunately history has taught us differently. A body that is in some way separated from the responsibilities of executive governance and judicial administration is in a position to take a leading role in the field of human rights. By maintaining its real and perceived distance from the government of the day, such a body can make a unique contribution to a country's efforts to protect its citizens and to develop a culture respectful of human rights and fundamental freedoms."

- c) Requiring HREOC to obtain the approval of the Attorney-General to seek leave to intervene in court proceedings allows the Attorney-General to exercise political control over HREOC.
- d) The Explanatory Memorandum asserts that this provision will "ensure that the intervention function is only exercised after the broader interests of the community have been taken into account". The ADCQ questions why it would ever be in the "broader interests" of the community for the courts not to hear a human rights perspective on important matters. These "broader" interests may actually be about electoral gain or the ideology of the current Government rather than about the community's interests.
- e) The Queensland Anti-Discrimination Commission has an intervention function (*Anti-Discrimination Act 1991* sec 235(j)) and the ADCQ can exercise this power completely independently of the government of the day.
- f) HREOC's independence in performing its intervention function is crucial in that the Commonwealth may sometimes be the respondent in matters where human rights are at issue. There is clearly a conflict of interest in the Attorney-General having a veto power over interventions in matters where the Commonwealth is a litigant.
- g) The Bill contains no accountability or review provisions in the event of the Attorney-General denying consent for HREOC to seek the court's leave to intervene..
- h) The changes would prevent HREOC from approaching a court directly and allowing the court to decide what it needs in terms of independent views and who should be given leave to intervene.
- i) If the Attorney-General were to refuse consent, this would prevent the Commission from assisting the court as it has done on many occasions, by providing a human rights perspective that may not otherwise be heard.

3. Provision for Complaints Commissioners

The ADCQ opposes the provision allowing the Attorney-General to appoint part-time Complaints Commissioners to whom the HREOC President may delegate complaint-handling functions for the following reasons:

- a) HREOC employs conciliators to whom the President delegates complaint-handling functions. The President is able to set administrative guidelines for and monitor the work performance of these staff members so that complaints are dealt with in a timely, consistent and professional manner. The President would have no such control over complaints commissioners appointed by the Attorney-General.
- b) This provision has the potential to further undermine the independence of HREOC in terms of its ability to select its own staff. It is possible to envisage a scenario in which the Attorney-General appoints complaints commissioners and further cuts HREOC's budget, thereby impinging on HREOC's ability to employ an adequate number of conciliators in its own right. In this eventuality, the President would have no option but to delegate complaint-handling to the Attorney-General-chosen "complaints commissioners".
- c) The Bill allows the Attorney-General to terminate the appointment of complaints commissioners at any time. This opens the possibility for the Attorney-General to dismiss complaints commissioners who have not handled matters to his liking.
- d) HREOC's complaint-handling workload does not indicate that complaints commissioners are needed.

4. Removal of power to recommend damages or compensation

The ADCQ opposes the removal of HREOC's power to recommend the payment of damages or compensation following inquiries into complaints made under the retitled *Australian Human Rights Commission Act 1986* for the following reasons:

- a) The *Human Rights and Equal Opportunity Commission Act 1986* is already weak in that a complaint under this legislation cannot be taken to the Federal Court or the Federal Magistrates Court if it is not settled by conciliation. The change the Bill proposes further weakens HREOCA. The ADCQ would prefer to see the Commonwealth Government strengthening the protection of human rights by giving HREOCA complaints the same possibilities for enforcement as have been provided for complaints made under the other federal anti-discrimination legislation.
- b) The Bill removes HREOC's capacity to quantify the hurt suffered by a complainant in a way that will be understood by the Parliament or by a private respondent.
- c) Where a complainant has suffered a loss of wages because of discriminatory treatment, it is obviously quite possible and also quite helpful for HREOCA to quantify such losses. According to HREOC, private respondents have paid the recommended compensation on a number of occasions.

- d) Taking away the power to recommend the payment of damages or compensation may well reduce the motivation of respondents to engage in the conciliation process. In the event that conciliation is unsuccessful, it leaves HREOC's basket of options even emptier than it already is.

5. Refocussing the Human Rights and Equal Opportunity Commission on education functions

While not opposing the Bill's focus on education, the ADCQ regards these provisions as hollow for the following reasons:

- a) The Explanatory Memorandum claims that the Bill makes education, dissemination of information on human rights and assistance to business and the general community central functions of the new Commission. In fact, the Bill simply restates the existing functions of HREOCA but in a different order. Education has always been one of HREOC's central functions and it is doubtful that the reordering of its functions will make the slightest difference.
- b) The current Commonwealth Government has cut HREOC's budget very substantially in recent times. The 1998/99 budget reduced HREOC's funding by around 40% and there have been no increases since. HREOC's capacity to fulfil its education functions (as well as its other functions) are hampered by budget cuts.
- c) While human rights education is important, it does not give people redress for breaches of their rights and it does not substitute for independent scrutiny of Australia's compliance with the international conventions it has ratified.
- d) The provision that a by-line "*human rights – everyone's responsibility*" accompany HREOC's new name is facile. It is most surprising that the Commonwealth Government would seek to legislate on such matters.