Submission on the Australian Human Rights Commission Legislation Bill 2003

to
The Senate Legal and Constitutional Legislation Committee

by
Anti-Discrimination Commission Queensland

30 April 2003

1. Introduction

In the view of the Anti-Discrimination Commission of Queensland (ADCQ), the Australian Human Rights Commission Legislation Bill 2003 is not welcome. The Bill undermines the protection of human rights in Australia by weakening the Human Rights and Equal Opportunity Commission (HREOC) and its ability to monitor Australia's compliance with its international legal obligations.

The Bill does this by reducing the number of federal commissioners from five to three. The Bill abolishes the identified portfolio commissioner positions which have served as an important focus for human rights work. The Bill hampers HREOC's ability to intervene in court proceedings. It also prohibits HREOC from recommending the payment of damages or compensation in some matters.

It is an embarrassment that the Australian Government participates fully in United Nation's human rights processes and criticises the human rights records of other nations while introducing domestic legislation that attempts to undermine human rights implementation.

The Anti-Discrimination Commission Queensland is an independent body and, as such, did not consult with or receive the consent of the Queensland Government before making this submission. The ADCQ values its independence and, accordingly, is alarmed at the Commonwealth Government's attempt to undermine the independence of HREOC.

2. Restructuring of the Human Rights and Equal Opportunity Commission

The ADCQ opposes the abolition of the identified portfolio Commissioners and the establishment of generalist 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. The Aboriginal and Torres Strait Islander Commissioner position was established in 1993 following the Royal Commission into Aboriginal Deaths in Custody, as an ongoing national monitoring mechanism. There is no indication that the position of Indigenous people in Australia no longer needs monitoring or that this should be done on a part-time basis by a generalist commissioner in a dual or multi-faceted role.

   The *Social Justice Report 2001* noted that the level of over-representation of Indigenous prisoners had worsened since the Royal Commission:

   > The number of Indigenous prisoners has increased at an average rate of 8% per year since 1991, compared with an increase in the non-Indigenous prisoner population of 3% per year on average. This has meant that the

> number of Indigenous prisoners in 1999 made up 20% of the total prisoner population in 1999 compared to 14% in 1991. That a group that constitutes just over 2% of the total population provides 20% of the country's prisoners is shocking. (Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 200, p12)*

The Report also noted that the rate of imprisonment of Indigenous women had nearly doubled between 1991 and 1999.

It is noteworthy, in the context of this Bill, that the Aboriginal and Torres Strait Islander Commissioner, Dr William Jonas, in the *Social Justice Report 2002* has been critical of the Commonwealth Government's approach to Indigenous issues, while, at the same time, noting "much goodwill" at the state and territory levels:

> There have been two particularly worrying trends that have been confirmed over the past year at the federal level. The first is a continuation of the antagonistic and adversarial approach to Indigenous policy by the Government. Substantial bi-partisan support for reconciliation and directions in Indigenous policy has been undermined by the limited focus of the Government. Those areas on which there is common ground are relatively few – and basically relate to agreement on the need to overcome Indigenous disadvantage – and there is even less agreement on what are the best ways to address such issues.
>
> The second worrying trend is what has effectively been the relegation of Indigenous issues to a second tier issue for the Government. While reconciliation was a priority for the second term of the Government, it does not even rate a mention in recent announcements of the Government's strategic long-term vision for Australian society. Indigenous issues are not treated as a national priority, and there are no public commitments to timeframes for achieving results in areas on which there is substantial agreement – such as Indigenous disadvantage. (Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2002, p2)*

In 1999, the United Nations' Committee on the Elimination of Racial Discrimination urged Australia to reconsider its attempt at that time to abolish the Aboriginal and Torres Strait Islander Commissioner position, given the continuing political, economic and social marginalisation faced by the Indigenous community (UN Doc: A/54/18, para. 21(2)).

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.

   The table in appendix 1 illustrates this point. It shows that in the state and territory jurisdictions, between 70 per cent (New South Wales) and 92 per cent (Western Australia) of complaints lodged were on grounds that fall broadly within

the portfolios of the federal Sex, Race and Disability Commissioners. This is a clear indication that the various federal governments which created the identified portfolio commissioner positions were not wrong in identifying the portfolios needed and that these remain the areas of need.

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.

   HREOC has established well-respected policy units around each identified portfolio commissioner and these are likely to dissipate if the commissioner positions are not retained.

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.

   The complaint-handling workload of many of the state and territory anti-discrimination commissions is very high with the result that there are few resources available for the valuable research and policy work that has been done by HREOC.

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.

   In addition to the thousands of complaints of discrimination and human rights violations that HREOC has handled, there have been the many public inquiries that have covered diverse groups and issues such as:

   - homeless children
   - pregnancy discrimination
   - people affected by mental illness
   - accessibility of electronic commerce and new service and information technologies for older Australians and people with a disability
   - separation of Aboriginal and Torres Strait Islander children from their families.

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.

In the view of the ADCQ, HREOC has been strengthened by the fact that the specialist portfolio commissioners have generally been from one of these groups. This has meant that they have brought the relevant life experience and community perspective to their positions.

The Bill requires the Minister to be satisfied that the Human Rights Commissioners, as a group, have expertise in the variety of matters likely to come before HREOC. This provision is weak because of its vagueness.

Australia assisted in developing the United Nations' Principles Relating to the Status of National Institutions that set out international minimum standards for national human rights institutions (the Paris Principles, developed in October 1991 and endorsed by the General Assembly in 1993 – resolution 48/134). One of these principles is that national human rights institutions should have a "pluralist" representation (Composition and guarantees of independence and pluralism, point 1). In the view of the ADCQ, the establishment of the specialist portfolio commissioner positions has been a good way of ensuring such pluralism.

The seventh annual meeting of The Asia Pacific Forum of National Human Rights Institutions held in New Delhi in November, 2002, reaffirmed that the structure and responsibilities of national institutions should be consistent with the Paris Principles and, on this basis, admitted the national human rights institutions of Malaysia, the Republic of Korea and Thailand as full members of the Forum.

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.

3. 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 Paris Principles which 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. (Methods of operation (a)).

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.

The Paris Principles state that a national human rights institution "shall be given as broad a mandate as possible" (Competence and responsibilities, point 2). In the view of the ADCQ, the Commonwealth Government should be widening the mandate of HREOC rather than narrowing it.

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.

Whether reality or perception, it would clearly undermine public confidence in HREOC, as an independent body, if the Attorney-General were to be given such control.

As outlined in the United Nations' fact sheet number 19, referred to earlier, independence is paramount for national human rights institutions. Various governments around the world have included guarantees of independence in their human rights legislation.

In South Africa, the *Human Rights Commission Act 1994* includes a section titled "Independence and impartiality". This part states that :

> No organ of state and no member or employee of an organ of state shall interfere with, hinder or obstruct the Commission, any member thereof or a person appointed under section 5(1) or 16(1) or (6) in the exercise or performance of its, his or her powers, duties and functions. (sec 4(2)). This Act also provides that: "All organs of state shall afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission. (sec 4(3)).

As in a number of Latin American countries, in Argentina the Defensor del Pueblo (ombudsman) is the national human rights institution. The Act for the establishment of the Ombudsman provides that the office of the Defensor del Pueblo "shall exercise the functions provided for in this Act and shall not receive instructions from any authority whatsoever". (Chapter 1 Article 1 Section 1)

The ADCQ would prefer to see the Commonwealth Government looking at and adopting or adapting examples to guarantee HREOC's independence rather than undermining it.

d) The Explanatory Memorandum (point 37) 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.

   The Government's explanation implies that human rights are discretionary rather than universal and non-negotiable.

e) The Anti-Discrimination Commission Queensland has an intervention function which is virtually identical to HREOC's existing function (*Anti-Discrimination Act 1991* sec 235(j)). The ADCQ considers it vital that it can exercise this power completely independently of the government of the day.

   Such functions are by no means unique amongst legislation establishing human rights institutions around the world.

In India, the *Protection of Human Rights Act 1993* provides that one of the functions of the National Human Rights Commission is to:

> intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court. (sec 12(b))

In the Republic of Ireland, the *Human Rights Commission Act 2000* provides that one of the functions of the Human Rights Commission is:

> to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as an amicus curiae in proceedings before that court that involve or are concerned with the human rights of any person and to appear as such an amicus curiae on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion). (sec 8(h))

In Indonesia, *Act No. 39 of 1999* provides that one of the functions of the National Commission on Human Rights is:

> on approval of the Head of Court, provide input into particular cases currently undergoing judicial process if the case involves violation of human rights of public issue and court investigation, and the input of the National Commission on Human Rights shall be made known to the parties by the judge. (sec 3(h))

In the Republic of Korea, the National Human Rights Commission Act sets out the authority of the National Human Rights Commission. One such authority is:

> In the event proceedings to affect the protection and improvement of human rights are pending, the Commission may, if requested by a court or the Constitutional Court or deemed necessary by the Commission, present the opinions on matters to the competent division of the court or the Constitutional Court.

In an address at the University of Manchester in November 2002, the Chief Commissioner of the Northern Ireland Human Rights Commission, Professor Brice Dickson, discussed the intervention role of human rights commissions. He said:

> Strangely, this is a power which my own Commission had to go all the way to the House of Lords to secure for itself. While we were expressly given the power to assist individuals and to take cases in our own name, the legislation was silent on whether we could apply to a court to intervene. Assuming that we did have such a power we successfully applied to intervene in four High Court cases within a year of our creation – again, regrettably, without succeeding to any great extent in convincing the judges that our points had merit. Then, when we sought to intervene in the inquest into the 1998 Omagh bomb, which killed 29 people, the coroner ruled that we had no power to do so. We sought judicial review of that ruling but were unsuccessful first before the Lord Chief Justice of Northern Ireland and then before the Court of Appeal.

> It was only when we got to the House of Lords earlier this year that we obtained what we always thought we deserved, namely a ruling that we had all the powers reasonably incidental to or consequential upon those which were expressly conferred upon us. Had we not been granted the power to intervene, it would have been richly ironic. This is because the government itself was permitted to intervene in this very case (and did so at our request), and so were non-governmental bodies, all in support of our position. If a statutory body which had been set up to protect human rights had not been allowed the same interventionist power it would have seriously undermined our credibility. (Brice Dickson, The Harry Street Lecture, "The Contribution of Human Rights Commissions to the Protection of Human Rights", University of Manchester, 21 November, 2002)

The ADCQ trusts that the Australian Senate will reflect on the views of the British House of Lords and Professor Dickson on the importance of the intervention power for an independent human rights institution.

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.

Canada's Attorney-General, the Honourable Anne McLellan, clearly understood that the government may often be a litigant when she said that the human rights movement "has been largely about individuals seeking protection from the abuses of state". Ms McLellan went on to say:

> Expecting governments to safeguard human rights, on their own, even in a democratic society as open and tolerant as ours, is insufficient. It is for this very reason that we have the good fortune to have so many institutions – the courts, federal and provincial human rights commissions, and other administrative tribunals – whose mandates and responsibilities are to ensure that Canadian citizens are protected from human rights abuses. (Hon Anne McLellan, notes of an address to the Universal Rights and Human Values Conference, Edmonton, 26 November, 1998)

Some of the cases in which HREOC has intervened involve immigration matters, for example, access of people in detention to legal representatives. It is not beyond the bounds of possibility that an Attorney-General and his Cabinet colleagues may not welcome HREOC's intervention in matters such as these and may, therefore, deny consent on the grounds that the "broader interests of the community" would not be served by such an intervention.

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.

This further heightens the perception that the provision could be used to exercise political control over HREOC.

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.

The outcome may be that the court may allow interventions from other bodies, including NGOs and the Commonwealth Government, but not be given the opportunity to decide for itself whether it would welcome input from HREOC.

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.

One outcome of this is that it may be left up to non-government human rights organisations to seek leave to intervene so that the courts could have the benefit of a human rights perspective. Another outcome, of course, is that the courts may be denied the opportunity to hear such a perspective at all if the resource-starved non-government sector could not afford to or did not wish to participate in this way.

Hon. Justice Michael Kirby in a 1999 paper in the *Australian Journal of Human Rights,* commented on an increasing number of matters coming before the High Court in which some aspect of international law is raised for decision. Justice Kirby said:

> Perhaps because of cutbacks in government funded legal assistance, the number of litigants in person appearing before the High Court is increasing. This is also a phenomenon in the State and Federal appellate courts. Obviously, without skilled legal representation, it is likely that ill-conceived or misunderstood principles of human rights, referred to in international law, will be invoked by such litigants in the hope that they can over-ride the domestic law which is the apparent impediment to relief. An accurate appreciation of the true relationship between international law and domestic law is not always enjoyed by trained lawyers. It should therefore not come as a surprise that it is not fully understood by lay people who commonly expect international law to over-ride domestic law and to be capable of doing more than it ordinarily can. (Hon Justice Michael Kirby "Domestic implementation of international human rights norms", *Australian Journal of Human Rights,* 1999, vol 5 No 2 pp114 -- 115)

It seems likely, given the circumstances described by Justice Kirby, that the courts may welcome intervention from HREOC on occasions.

j) Given that there is no mechanism which ensures that HREOC is notified when relevant cases arise, the onus is on HREOC to monitor and identify such cases. A further requirement that HREOC ask for and receive the Attorney-General's

consent before seeking leave to intervene would involve considerable time and may mean the chance for intervention was lost.

4. 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.

5. 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 human rights complaints and ILO 111 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 HREOC 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.

e) The reason given in the Explanatory Memorandum to justify removal of HREOC's capacity to recommend payment of damages or compensation is that such "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" (point 52).

   In the view of the ADCQ, this is a weak explanation. The explanation fails to mention that HREOC makes a report to the Attorney-General on these matters, which is tabled in Parliament, and that, in this way, such recommendations carry some moral force.

   Perhaps the Commonwealth Government is uncomfortable with HREOC publicly recommending damages or compensation against the Commonwealth, as it has on a number of occasions, sometimes in matters that have attracted considerable publicity, including asylum seeker issues.

   Since 2000, HREOC has provided the Attorney-General with 15 reports relating to human rights and ILO 111 complaints. Twelve of these reports have involved immigration matters and HREOC has recommended financial compensation in six of these. Another of these matters involved the Australian Defence Forces and financial compensation was also recommended in this matter.

6. 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 (with minor amendments only) 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.

7. Conclusion

The ADCQ is disappointed that the community has been given so little time to lodge submissions with the Committee. We are also disappointed with the Committee's decision to hold hearings only in Sydney and Canberra. We would welcome the opportunity to speak with the Committee.

Along with many NGOs in Queensland, the ADCQ values HREOC and wants to see it strengthened. The Bill is a negative development for the protection of human rights in Australia. In our view, it is a deliberate attempt to weaken the powers of HREOC, undermine its resources and dissipate community identification with its functions.

The claim that the Bill is a "reconsideration of the responses to past efforts at reform" (Second Reading Speech) is a dubious one in that the most objectionable parts of the Bill are identical to those in the 1998 Bill which was examined by the Senate Legal and Constitutional Legislation Committee.

We trust that the Committee will give more consideration to the views of the community on this matter than the Government has obviously done in drafting the Bill.

APPENDIX 1 **Complaints lodged with State and Territory anti-discrimination commissions, by ground, 2001-02**

GROUND	QLD	WA	NT	VIC	NSW	ACT	SA	TAS[i]
Sex	141	77	29	464	392	10	24	8
Breastfeeding	4		1	2		4		6
Family/carer responsibilities/status	29	29	9	164	67	10		20
Pregnancy	46	28	2	93		6	6	6
Marital status	59	29	16	70	24	8	7	3
Sexual harassment	168	80	3	409		19	7	4
Race	171	164	45	233	262	37	18	10
Racial vilification /harassment	23	11			55	5		
Impairment/disability /medical record	249	143	33	703	332	57	42	38
SUB-TOTAL	890	561	142	2138	1132	156	104	95
All other grounds[ii]	364	48	33	775	482	55	32	39
TOTAL	1254	609	175	2913	1614	211	136	134
% Complaints based on first 9 grounds	**71%**	**92%**	**81%**	**73%**	**70%**	**74%**	**76%**	**71%**

[i] Figures based on 2000/01 Annual report. Complaints based on single attribute only

[ii] Excludes complaints on the basis of association and victimisation complaints. Includes complaints based on age, sexuality, physical appearance, religion, trade union activity, political activity, criminal record, gender identity, transexuality, lawful sexual activity and profession. These grounds vary from state to state