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

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This submission deals with one aspect of the bill, namely, the proposal to require the Human Rights and Equal Opportunity Commission (HREOC) to obtain approval from the Attorney-General prior to intervening in litigation. In a co-authored submission led by Professor Peter Bailey, my colleagues and I have argued against the introduction of such a veto power. In this brief submission, I will expand upon the importance of HREOC's intervention role. My focus will be on cases that may be particularly sensitive to government, namely those involving asylum-seekers. It is precisely this sensitivity which makes HREOC's role so valuable and which demonstrates that any power of veto on behalf of the Attorney-General is undesirable. Refugees and asylum-seekers are human beings with human rights and they need sources of protection for their rights which are independent from government, just as Australian citizens do.

With due respect to the Attorney, the rationale for the proposed veto given in the second reading speech and the explanatory memorandum is as unconvincing as it was when it was first used in relation to the 1998 Human Rights Legislation Amendment Bill (No. 2). The Attorney argues that the veto "will ensure that the intervention function is only exercised after the broader interests of the community have been taken into account:" explanatory memorandum, at para 37. In fact, the Attorney will not be required to take into account such interests as the bill only proposes that he *may* have regard to such interests, and he may decide to take into account other factors which are unspecified in the bill. In its report in relation to the 1998 bill, the Senate Legal and Constitutional Committee noted a submission by the Launceston Community Legal Centre in which it was stated that "[s]hould such decisions be left to the Attorney-General, the potential for human rights issues to be marginalised in favour of political expediency and electoral gain would become a real and serious problem": Senate Legal and Constitutional Committee, Human Rights Legislation Amendment Bill (No. 2), para 2.9. In any event, as constituents of a liberal democracy, members of the Australian community have an interest in the protection of every person's human rights. The establishment of HREOC as an independent statutory body reflects this interest, and the power to intervene in litigation in relation to any human rights issue is one effective mechanism to ensure those rights are upheld. Requiring HREOC to obtain approval from the Attorney, when it is clear that he is not only the first law officer, but a political figure who is quite likely to be a party in the litigation, is inappropriate. The Courts already exercise the function of

granting leave to intervene, and the Courts alone should retain that role if justice is to be seen to be done.

In order to illustrate the importance of an independent intervention role for HREOC, I will refer to two recent examples of litigation in which HREOC has intervened, namely:

- the *Tampa* litigation;
- and a challenge to the detention of a Palestinian asylum-seeker, Mr Al Masri, whose claims for protection had failed, but who, through no fault of his own, could not return home.

The point of the first case-study is that HREOC made valuable submissions concerning Australia's international legal obligations and that the government's clear interest in a particular result in a case should not be permitted to play any role in a decision as to HREOC's ability to intervene in litigation. In relation to the second case-study, it is also demonstrable that the submissions made by HREOC had some impact as they are summarised and referred to in the Court's decision. Naturally, the Courts make their own decisions, however it is clear that HREOC's high quality submissions are helpful to the Courts even when no reference is made to them. The Courts would not grant leave to intervene otherwise.

The Tampa litigation

The *Tampa* litigation arose because the government had decided that none of the asylum-seekers on board the *Tampa* would set foot on Australian soil. This resulted in a stand-off in which 433 asylum-seekers, some of whom were children and some of whom were pregnant or required medical attention, were kept on board a vessel designed to carry around 50 sailors for approximately a week. As a matter of international law, this may well have violated Australia's obligations not to detain persons arbitrarily and to secure humane conditions of detention: see Articles 9 and 10, International Covenant on Civil and Political Rights, Article 37(b) Convention on the Rights of the Child, and Article 31 Convention Relating to the Status of Refugees. As the European Court of Human Rights has commented in relation to the relevant provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it is unacceptable to restrict a person's liberty until such time as the "vagaries of diplomatic relations" determine that the person may go elsewhere: *Amuur v France* (1996) EHRR 533, at para 48.

HREOC was granted leave to intervene and made detailed submissions concerning Australia's international legal obligations. At first instance, the Federal Court based its decision on the common law and the remedy of *habeas corpus*: *Victorian Council*

for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs (2001) 110 FCR 452. This demonstrates the point that the Courts will make their own decisions on the merits of the case and on grounds that they view as legally relevant.

The Full Federal Court, with Chief Justice Michael Black in dissent, held that the actions to remove the asylum-seekers were valid exercises of executive power and that the Commonwealth had not illegally detained the asylum-seekers: *Ruddock v Vadarlis* (2001) 110 FCR 491. Nevertheless, the value of the litigation and HREOC's intervention in the litigation is, in my view, unquestionable. As stated by one of the two judges in the majority in the Federal Court appeal, the counsel and solicitors acting in the interests of the *Tampa* asylum-seekers had "sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions:" *Ruddock v. Vadarlis*, *op cit*, at 549, per French J.

Is it likely that the Attorney-General would have consented to HREOC's intervention in this matter? I think not. It is true that the Attorney-General consented to the intervention before the Court. However, the Courts do not consider the factors that may be considered by the Attorney if the proposed veto is implemented. If the public interest is going to be the key factor, then it is clearly of concern that the government viewed the "public interest" in the *Tampa* incident solely in terms of Australia's power to control its borders rather than the rights of asylum-seekers. The legislation that followed the *Tampa* incident has sought to diminish the rights of asylum-seekers to apply for protection in Australia and to seek review of their treatment, through the creation of the "excised offshore places" and "offshore entry persons" (see the definitions in section 5 of the Migration Act), the general privative clause in section 474 of the Migration Act and smaller, specific ouster clauses such as section 494AA Migration Act (which bars legal proceedings in relation to offshore entry persons but which contains the proviso that "[n]othing in this section is intended to affect the jurisdiction of the High Court under section 75 of the *Constitution*"). This is a misguided approach, both as a matter of international law and relations and as a matter of domestic law and politics, and it should not be permitted to play a decisive role in determining whether HREOC may intervene in litigation.

On the international plane, while no-one contests the power to control immigration, Australia has acknowledged, by becoming party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, that forced migration is a reality -- it will occur no matter how much we wish it would not -- and that to return persons to a place of persecution or otherwise to mistreat them is to become the persecutors' accomplice. It should be noted that Australia helped to draft the 1951 Convention and voluntarily ratified the Convention, and is one of 136 states which are party to both the 1951 and 1967 treaties.

On the domestic plane, the government's stance ignores the fact that Australia is a liberal democracy and that, accordingly, protection for individuals, including and often especially, those individuals who belong to minority groups or who are otherwise vulnerable, must be guaranteed. The principle of the separation of powers is one fundamental principle that helps to protect the rights of individuals. The creation of independent statutory bodies such as HREOC is another means by which to protect these rights and the functions of such bodies should not be made subject to political machinations or the appearance of political interference. In the case of HREOC interventions in litigation, the intersection of these two principles -- the separation of powers and the fact that the Courts, rather than the legislature or executive, are in charge of the proceedings, and the independence of statutory bodies created in order to protect human rights -- combine to make a powerful case against the proposed veto power for the Attorney-General. This is particularly true when the government is able to make its own case before the Courts as a party to the litigation, or through the Attorney-General's power to intervene in litigation. Why should the government be able both to make its case and to deny the Courts the benefit of hearing from HREOC?

The case of Mr Al Masri

In this case, the Full Federal Court held that section 196(1)(a) of the Migration Act, which had been used to detain an unsuccessful asylum-seeker who had requested removal from Australia, is subject to an implied limitation that there is a real likelihood or prospect of the removal of the person from Australia in the reasonably foreseeable future: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70 (unreported, 15 April 2003, Black CJ, Sundberg and Weinberg JJ), at para 136. The Court was concerned that a person might be detained, indefinitely, theoretically permanently, simply because the person could not be removed from Australia, when the legislation did not expressly contemplate such a possibility; it was unclear whether the legislature had turned its mind to the possibility of indefinite or permanent detention; and it is likely that such detention would be punitive and constitutionally invalid. The Court took care to note, as had the judge at first instance, that release from detention in such circumstances does not imply a right to remain in Australia and that "[t]he power and duty to detain would be enlivened again when there was a real likelihood or prospect of removal in the reasonably foreseeable future:" *Al Masri, op cit*, at para 128. The Court also noted that it would be appropriate to require the person concerned to report regularly to the appropriate authorities: *Al Masri, op cit*, at para 128.

HREOC intervened in the case, making submissions that the legislation should be read consistently with limitations flowing from constitutional principles (particularly the separation of powers), with common law assumptions concerning the need for

unambiguous statutory language to displace individual rights, and with relevant international legal provisions concerning the right to liberty. The submissions are summarised in the judgment at paras 45 - 48.

In relation to the international human rights which HREOC is specifically empowered to bring to the attention of the courts when it intervenes under s 11 of the Human Rights and Equal Opportunity Act, the Court determined that:

> Since the interpretation [of the Migration Act] contended for by the Solicitor-General requires detention irrespective of the foreseeable prospects of removal and irrespective of the personal circumstances of the individual and, particularly, irrespective of the likelihood or otherwise of the individual absconding, it is a compelling conclusion that detention of that nature would be arbitrary detention within the meaning of Art 9(1) [of the International Covenant on Civil and Political Rights.] (at para 153.)

After referring to HREOC's submissions (at para 142), the Court concluded that Australia's international obligations supported the implied limitation on the power of detention under s196(1)(a) of the Migration Act. In drawing this conclusion, the Court referred to relevant international jurisprudence, particularly the views of the Human Rights Committee, which supervises the International Covenant on Civil and Political Rights, and to the work of jurists who had examined the *travaux preparatoires* to the International Covenant on Civil and Political Rights.

The importance of HREOC's interventions in relation to international human rights principles cannot be underestimated. In many cases, international legal principles are not brought to the fore by counsel. Often, counsel acting for asylum-seekers are not sufficiently aware of the relevant principles and are not well-versed in the relevant tools of construction and jurisprudence. HREOC is well-placed to fill this gap.

If the Attorney-General had had a veto power as proposed by the bill, these submissions may never have been made. It is true that the Attorney did not oppose HREOC's intervention before the Court, however, as stated previously, the Courts do not consider the factors that may be considered by the Attorney-General if the proposed veto is implemented. Moreover, if public interest is to be the key factor, it seems likely that an individual's liberty would have taken second place to a "public interest" defined by "the vagaries of diplomatic relations" (see *Amuur's case, op cit*).

Foreign relations were put forward by the Solicitor-General as reasons for indefinite detention. These concerns were clearly inflated and the Court rightly said that they did not support the government's arguments. The Court stated that,

> [c]oncerns relating to the conduct of the affairs of state were put forward as reasons why the Parliament must have intended a scheme of detention without ... the limitations found by the primary judge. It was said that if there were any such limitations, the consequences would include the possibility of interference with complex and sensitive discussions between governments about the removal of non-citizens; that there might be volatile political situations overseas; and that the need for a coordinated and strategic approach to removals might be impaired. These considerations do not individually or together provide a compelling reason to reject an implied limitation on the power to detain. For one thing difficulties of this nature cannot be said to be the inevitable and direct consequence of such a limitation. These difficulties may or may not occur, but if they were to occur they would no doubt be dealt with by the court with the appropriate regard to the requirements of confidentiality, the expertise of those who have the responsibility for the conduct of Australia's international relations and a due appreciation as well of the practical difficulties involved in such matters. (at para 130)

The willingness of counsel for the government to put forward such arguments illustrates the importance of retaining HREOC's independent power to seek leave to intervene from the courts.

Conclusion

The two case-studies demonstrate both the usefulness of HREOC's interventions in litigation and the harmful impact of the proposed Attorney-General's veto. In closing, I would like to comment on the fact that HREOC's interventions are an integral part of the educative function which the bill seeks to strengthen. As I have noted, counsel are not always well versed in relevant international legal principles. An independent right on the part of HREOC to intervene in litigation is one way of performing an educative function with a potentially direct and positive impact for the observance of human rights in Australia. It should not be removed.

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From: Penelope Mathew [MathewP@law.anu.edu.au]
Sent: Thursday, 24 April 2003 4:10 PM
To: Legal and Constitutional, Committee (SEN)
Subject: submission to Senate Legal and Constitutional Committee -please forward to John Ley or Louise Gell

Dear Sir or Madam,

I enclose a submission to the Senate Legal and Constitutional Legislation Committee concerning the Australian Human Rights Commission Legislation Bill 2003.

Please acknowledge receipt.

Sincerely,

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