

**SENATE LEGAL AND CONSTITUTIONAL  
LEGISLATION COMMITTEE**

**INQUIRY INTO THE PROVISIONS OF THE  
AUSTRALIAN HUMAN RIGHTS COMMISSION  
LEGISLATION BILL 2003**

**SUBMISSION**

**SUBMISSION NUMBER:** 124

**RECEIVED FROM:** NSW Bar Association

**CONTACT PERSON:** Mr Bret Walker SC

**ADDRESS:** 174 Phillip Street  
SYDNEY NSW 2000

**TELEPHONE:** 02 9229 1736  
**FAX:** 02 9222 9678  
**EMAIL:** [koneill@nswbar.assn.au](mailto:koneill@nswbar.assn.au)

**DATE RECEIVED:** 25 April 2003

**NO. OF PAGES:** 4

**Clifford, Julia (SEN)**

---

**From:** Kathy O'Neill [koneill@nswbar.asn.au]  
**Sent:** Thursday, 24 April 2003 5:50 PM  
**To:** Legal and Constitutional, Committee (SEN)  
**Subject:** Provisions of the Australian Human Rights Commission Legislation Bill 2003



Inquiry Australian  
Human Right...

Dear Mr Ley

Attached is The New South Wales Bar Association's submission in relation to the provisions of the Australian Human Rights Commission Legislation Bill 2003.

I confirm that the President, Bret Walker SC will give evidence at the Committee's public hearing in Sydney on Tuesday 29 April 2003 at 10:15am.

Should you have any queries at all in relation to the submission, or require any further information, please do not hesitate to telephone myself, or the Association's Executive Director, Mr Philip Selth on 02 9229 1735.

Regards,  
Kathy O'Neill.

~~~~~  
Kathy O'Neill  
Executive Assistant  
New South Wales Bar Association  
Selborne Chambers  
174 Phillip Street  
SYDNEY NSW 2000  
DX 1204 SYDNEY  
Tel: 02 9229 1736  
Fax: 02 9222 9678  
email: koneill@nswbar.asn.au  
~~~~~

## Australian Human Rights Commission Legislation Bill 2003



### Intervention

1. The proposed amendments to sections 11 and 31 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), section 20(1)(e) of the *Racial Discrimination Act 1975* (Cth), section 48(1)(gb) of the *Sex Discrimination Act 1984* (Cth) and section 67(1)(l) of the *Disability Discrimination Act 1992* (Cth) that will require the Commission to obtain the Attorney General's approval prior to seeking leave to intervene in any proceedings undermines and impairs the Commission's independence and is contrary to the Paris Principles.<sup>1</sup>
2. There is no rational reason why the Commission should first be required to obtain the Attorney's approval and then seek the Court's approval.
3. First, the proposed amendment does not acknowledge the potential for a conflict of interest where the Attorney may be asked to approve an intervention, including considering the reasons why the Commission may seek to intervene, in proceedings where the Commonwealth is a party or where the Attorney-General himself seeks to intervene in proceeding by way of section 78A of the *Judiciary Act 1903* (Cth) or otherwise. The proposed amendments do not contemplate circumstances where the Court has sought or requested the Commission's intervention. Such requests have been made by the Family Court in cases concerning the forced sterilisation of intellectually disabled women.
4. Second, the proposed amendments would stifle the Commission's ability to act swiftly in urgent cases, particularly where the human rights concerns the rights of persons in detention. In two instances, the Commission sought leave to intervene in proceedings on less than 24 hours notice. The first was *Langer v Australian Electoral Commission (No 1)* (1996) 59 FCR 450 where the Commission was requested to intervene following Mr Langer's decision to represent himself on the eve of the Full

---

<sup>1</sup> UN Commission on Human Rights (*Resolution 1992/54 of 3 March 1992*) and the UN General Assembly (*Resolution 48/134 of 20 December 1993, annex*)

Court appeal. The Commission was granted leave to appear as a *amicus curiae* represented by Ron Castan QC and Tony Pagone QC. More recently, the Commission's intervention in *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. The proposed amendments make no provision for urgent action.

5. The justification for these amendments is that it is the role of the Attorney-General to ensure that the intervention function is only exercised after the broader interests of the community have been taken into account. It is respectfully submitted that whether the Commission is granted leave to intervene in a proceeding is a matter for the court taking into account the interests of the parties to that litigation and to permit the intervention on such terms as it thinks fit. The notion of the 'broader interests of the community' is not one over which the Attorney-General exercises a monopoly. In the context of human rights litigation, which invariably challenges government decisions, policies and actions, the broader community interests may best be served by the Commission independently being able to put before a court or tribunal relevant human rights principles.

#### **Role of President and Federal Court Judges**

6. A further concern arises in relation to the position of a President, who may be serving Chapter III judge, and his or her involvement in performing some of the functions in section 11(1) of the *Human Rights and Equal Opportunity Commission Act*. The Commission may on its own initiative or at the request of the Minister do the following:
  - to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination (section 11(1)(e));

- on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights (section 11(1)(j));
- on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument (section 11(1)(k));
- on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination (section 11(1)(m))

7. Similar functions are also found section 31 of the Act and they would involve the President, as a member of the Commission, providing advice to the a Minister. The exercise of such functions may be incompatible with the proper exercise of judicial power: *Wilson v Minister for Aboriginal Affairs* (1996) 189 CLR 1.
8. The proposed amendments contemplate the President of the Commission being a current and serving member of the Chapter III court. A further potentially raises a constitutional concern in relation to exercise of the President's to terminate complaints under section 46PH of the *Human Rights and Equal Opportunity Commission Act* 1986 for a range of reasons and where the termination of the complaint create a cause of action to commence proceedings in the Federal Court or Federal Magistrates Service. While the termination of a complaint enables a person to commence proceedings under section 46PO of the Act, there remains the possibility that a person aggrieved by the President's decision to terminate a complaint may also seek review under the *Administrative Decisions (Judicial*

*Review*) Act 1977 (Cth). It is clearly inappropriate for a Federal Court judge or Federal magistrate to exercise judicial review powers in relation to administrative decision making by a Federal judge who is the President of the Commission.