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Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Human Rights Commission Bill 2003

Submitted by:

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National Council of Churches in Australia (NCCA)

The National Council of Churches in Australia (NCCA) welcomes the opportunity to submit its views on the Australian Human Rights Commission Legislation Bill 2003 to the Senate Legal and Constitutional Affairs Committee, as it enables our member Churches and our specialised programs and commissions to contribute the expertise they have gained from involvement in human rights issues since 1948.

Submission to the Senate Legal and Constitutional Committee on the Human Rights Commission Bill 2003

Background

The National Council of Churches in Australia (NCCA)

The National Council of Churches in Australia (NCCA) is comprised of fifteen national Australian Christian churches working together to strengthen relationships and understanding of each other and to fulfil common witness, mission and service. Through the NCCA member churches come together to find a common voice on matters that concern us all, and to work for a just and equitable society, without poverty, oppression, injustice and division.

This submission is based on consideration of input from NCCA staff and the staff of our specialised units, including the National Aboriginal and Torres Strait Islander Ecumenical Commission and the National Program on Refugees and Displaced People.

The National Aboriginal and Torres Strait Islander Ecumenical Commission, formerly the Aboriginal and Islander Commission, is a Commission of the National Council of Churches in Australia (NCCA) established in 1989. It is recognised as the national Indigenous ecumenical peak body in Australia with a mandate to provide a forum for Aboriginal and Torres Strait Islander peoples to speak and take action on issues of faith, mission and evangelism, of Aboriginal and Torres Strait Islander spirituality and theology; and of social justice and land rights.

The National Program on Refugees and Displaced People operates under the Christian World Service Commission of the NCCA. It is concerned with policy relating to refugees, asylum, settlement, access and equity. It is also involved in awareness raising, education, community development and advocacy. This work is done in partnership with the State Councils of Churches, which each have a refugee program that maintains close links to the community and engages member churches in providing services to refugees and asylum seekers. The National Program and the State Councils involve member churches in issues relating to the legal and humanitarian aspects of the appeals process.

Introduction

The NCCA, through the work of many of its commissions and networks, is strongly concerned with the upholding of human rights in our community. The Human Rights and Equal Opportunity Commission (HREOC) has proven an important body in keeping important and often uncomfortable issues, such as the treatment of detained asylum seekers and the defence of indigenous rights, before us all. It is important that an informed, competent, well-resourced and independent body can challenge government, church and society.

It is equally important that any proposed changes to the HREOC Act or HREOC itself be allocated a proper period for community consultation and feedback. The NCCA believes the period set for this consultation has been inadequate.

Submission

The NCCA has identified the following areas for consideration:

1. Proposed Removal of the Commission's Independent Power to Intervene in Legal Proceedings

The present ability of the Commission to seek leave to intervene in legal proceedings involving human rights and discrimination issues is an important power. HREOC has used this power in about 35 cases before Australian courts and tribunals and has never been refused leave to intervene. Many of these interventions have been in cases of critical importance in establishing new legal precedents, challenging the legality of new legislation and interpreting new legislation.

If passed, the Australian Human Rights Commission Legislation Bill 2003 would see the newly-named Australian Human Rights Commission having to seek leave from the Attorney General to intervene in such court proceedings. The Attorney General argues this change is needed to balance overall community views.

The proposition, however, raises a number of very serious concerns.

First, there is the question of whether the Attorney General is best suited to determine "community interests" and act upon them.

Second, there is the far more important question of whether "community interests" should be considered at all, particularly given that most of the cases where HREOC has intervened have involved violations of individual human rights. Human rights are, in and of

themselves, 'indivisible' and community interests should never be allowed to over-ride the right of the individual.

Third, the Bill creates a conflict of interest as the Attorney General would have the power to determine whether HREOC may intervene to present expert opinion or testimony while at the same time representing the Federal Government in the same legal proceeding.

Fourth, the Judge in a legal proceeding, who either on advice or instruction, may wish to seek advice or evidence from HREOC could be over-ruled by the Attorney General. This would represent executive interference in a judicial proceeding and would stand in strong contrast to the doctrine of the separation of powers, which is fundamental to liberal democracies.

The importance of HREOC's independent power to intervene in legal proceedings has been demonstrated on numerous occasions. The most recent example is the April 15, 2003 decision of the full bench of the Federal Court in the Al Masri case. In this case, HREOC had sought leave to present evidence in a case involving the Federal Government. The Federal Court subsequently ruled that the Commonwealth has no power to continue to detain Al Masri in circumstances where there is no real likelihood or prospect of removing him from Australia in the reasonably foreseeable future. The Federal Court ruled that this practice breached an individual's fundamental human right to personal liberty and to be free from arbitrary detention and contravened both domestic and international human rights law, namely the International Covenant on Civil and Political Rights. The Al Masri case is a clear example where the Commission put a different view to the court than the Commonwealth. It would be inappropriate for the Commission to seek permission from the Attorney-General, the Commonwealth's first law officer, in such important human rights cases.

2. Impact on human rights work of the proposed restructuring of positions

While retaining the position of President, the Bill alters the structure of the Commission to replace the identified portfolio Commissioners (currently responsible for the areas of Human Rights, Sex Discrimination, Race Discrimination, Disability Discrimination and Indigenous Rights) with three Human Rights Commissioners who will have overlapping responsibilities.

The NCCA understands that the proposed changes are envisioned to give the Commission a strong educational role on human rights. The Memorandum to the Bill explains the new Commission would educate Australians about human rights and discrimination and their responsibilities in these matters, undertake research and educational programs on behalf of the Commonwealth and publish guidelines on appropriate acts or practices.

The NCCA welcomes any efforts that assist in human rights education in the community. The government could consider increasing funding for such education, e.g. in schools and by civil society groups while acknowledging that much human rights education is already effectively done by HREOC through the inquiries, reports, publications and legal interventions of the existing identified portfolio Commissioners and the media coverage such initiatives receive.

The danger of replacing portfolio-specific Commissioners with three non-specific Commissioners is that important specialised areas of work may not be adequately covered with the accumulative expertise that grows with specialist functions. Specialised expertise allows recognition of sometimes-subtle differences that are more likely to achieve a successful human rights outcome. Also, retaining specialist Commissioners would allow members of the community to be more confident in knowing whom to approach to lodge complaints or to appeal for the holding of specific inquiries or educational efforts by the Human Rights Commission.

3. NCCA's appreciation of Specialist Human Rights Commissioners

The importance of retaining specialist portfolio Commissioners in benefiting the work and concerns of the NCCA can be demonstrated by highlighting the importance of the work of some Commissioners in two areas of work of the NCCA - the National Aboriginal and Torres Strait Islander Commission (NATSIEC) and the National Program on Refugees and Displaced People (RDP) of the Commission for Christian World Service (CWS).

a) Race Discrimination Commissioner

The persons who have been appointed as Race Discrimination Commissioners since 1986 have overseen a range of reports and initiatives that have highlighted needs and strategies to address racial discrimination issues facing indigenous, non-English Speaking Background and Arab and Muslim Australians. Community information provision, awareness raising and education via the media and publications have been important strategies in these efforts. Indigenous Australians and refugees and asylum seekers have been among those who have benefited from this effort to combat discrimination and vilification based on race.

The NCCA is concerned with the loss of momentum in recent years on reconciliation between Indigenous and non-Indigenous Australians and the polarising of Australian community attitudes over asylum seekers and refugees - notably highlighted by the controversies around "The Tampa" and government policies and disturbances relating to immigration detention centres. Such controversies are used by sections of the media - and indeed by some politicians - to unnecessarily heighten community prejudice and fear.

Both Jewish and Muslim groups have expressed their worries about wider community hostility towards them due to the conflicts in the Middle East.

Australia's military involvement in the Middle East has also caused increased tensions in some sectors of our community. The NCCA is cooperating closely with Jewish and Muslim representatives in the Australian National Dialogue of Christians, Muslims and Jews to work towards greater mutual understanding and wider community tolerance and education. We are also working with religious and community bodies in groups such as the Australian Partnership of Ethnic and Religious Organisations (APER0). Such inter-faith collaboration is not only central to ensuring a tolerant, peaceful Australia but is a vital mechanism to help show a united religious position to calm community fears or prejudices in times of high tension, such as war and increased terrorism.

b) Aboriginal and Torres Strait Islander Social Justice Commissioner

The NCCA has two serious concerns:

First, the NCCA believes that the Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) plays an significant symbolic role, sending an important message to the Australian community and to the world that Australia is committed to upholding indigenous rights. The ATSISJC continually reminds us of the responsibilities that we, as a Nation, have towards our Indigenous brothers and sisters. Not only is Government reminded, but also other sections of the community, including the media, about what we should be doing to help protect the rights of Indigenous Australians. Additionally, removing the requirement that the ATSISJC - a position which carries enormous responsibility - be of Aboriginal or Torres Strait Islander descent, effectively diminishes the symbolic value of the position, as well as the Commissioner's credibility. How, for example, would a non-indigenous Commissioner be received abroad in meetings of international indigenous peoples at the United Nations?

Second, the existence of a specialised ATSISJC allows for the development of expertise in a vast and complex field. If the Aboriginal and Torres Strait Islander portfolio were to be subsumed by another generalist Commissioner, the ability of the generalist Commissioner to develop similar expertise would simply not be possible. In addition, there would be serious setbacks in the hand-over period between Commissioners. Furthermore, the NCCA believes that the argument that the proposed restructuring would create greater flexibility cannot be sustained. At the present moment, HREOC is vastly under-resourced. Placing an even greater burden on these generalist Commissioners would only hamper the work of HREOC rather than enhance its capacity and flexibility. Given the current situation, the

NCCA would prefer to see the creation of new generalist Commissioners in addition to the existing specialist Commissioners.

Without a full time specialist Commissioner, many of the achievements HREOC has made would not have been possible. Surely the Royal Commission into Deaths in Custody and the Bringing them Home report, as well as the annual reports on Native Title and Reconciliation have shown us the need for a designated, full time specialist. The recommendations from all these inquiries need to be tracked, and the specific Commissioner is able to ask questions regarding the implementation of recommendations and also to highlight successful strategies that show positive results.

c) Human Rights Commissioner

The work of the National Program for Refugees and Displaced People (RDP) Program of the NCCA's Commission of Christian World Service (CWS) has been informed and enhanced by the National Inquiry into Children in Immigration Detention, conducted by Dr Sev Ozdowski, HREOC's Human Rights Commissioner. Such informed, extensive public inquiries help promote human rights for the most vulnerable people in our community through independent public scrutiny, drawing together wide expertise and community involvement, media interest and the development of constructive policy proposals.

To summarise, NCCA's efforts in human rights areas are assisted by HREOC being able to provide specialist human rights Commissioners to vigorously undertake educational, media and legal work in countering prejudice, inflammatory media commentaries, general misconceptions and abuses under the law. As stated earlier, a likely weakness in resorting to three generalist human rights Commissioners is that the accumulated expertise provided by mandated specialist Commissioners will be considerably weakened.

4. Dealing best with emerging and existing human rights issues

The NCCA appreciates the argument in the proposed Bill that having generalist Commissioners allows flexibility to address emerging issues (such as age discrimination) or presently unanticipated human rights issues and areas. However, under the existing HREOC structure we suggest the President could do this broader surveying of the human rights landscape and highlight emerging issues and needs with government and community. Also, the Bill's proposal to abolish the Community Relations Council and Advisory Committees may weaken the Commission's present ability to detect and address emerging human rights issues in a comprehensive way. The NCCA is concerned that the Bill's alternative approach of allowing the President to appoint part-time Complaints Commissioners may see a narrower, legal

approach to issues and also reduce the resources available to the Commission.

The Bill also suggests that having generalist Commissioners would also allow greater flexibility to deal with current human rights issues that cut across boundaries of the existing specialist Commissioners, eg women with disabilities. A counter view is that the expertise developed by the existing specialist Commissioners should be developed and then shared to deal with such cross-boundary areas.

Presumably one of the specialist Commissioners could then decide to host a community investigation, educational campaign or legal intervention on the human rights area of concern.

5. Proposed removal of the power to recommend compensation

The Bill would remove the power to recommend compensation in cases under the HREOC Act. This change will impact most significantly in areas relating to immigration and employment. Individual Acts cover other areas of discrimination. While the existing power is only one of recommendation, not enforcement, it has a valuable educational role in highlighting HREOC's view of the gravity of the human rights breach. As such, there is value in this power being retained.

6. Maintaining a strong human rights model in our region

HREOC is considered a model "National Human Rights Institution" for regional human rights workers. The Australian Government has for many years promoted human rights institutions in the Asia Pacific region. Weakening HREOC will erode this exemplary work and undermine its attraction as a standard-setting model for regional governments to emulate, thus reducing the credibility of Australian lobbying for human rights elsewhere in the world.

7. Conclusion

The NCCA recommends that HREOC's existing structure and powers be retained. We believe this already provides a stronger, more focussed approach to upholding, protecting and advancing human rights in Australia than the approach proposed in the Australian Human Rights Commission Bill 2003.

The NCCA further recommends that HREOC's capacity be strengthened through the 'addition' of generalist Commissioners, rather than the replacement of existing Commissioners. In this way, HREOC will have greater capacity and be able to fulfil the Government's desire for greater flexibility.