SUBMISSION FROM THE HUMAN RIGHTS COMMITTEE OF NEW SOUTH WALES YOUNG LAWYERS

The Secretariat
Senate Legal and Constitutional Committee
Room S1.61, Parliament House
Canberra ACT 2600
AUSTRALIA

23 April 2003

Dear Committee Members,

AUSTRALIAN HUMAN RIGHTS COMMISSION LEGISLATION BILL 2003

We refer to the draft Australian Human Rights Commission Legislation Bill 2003 (the **Bill**).

The Human Rights Committee of NSW Young Lawyers (**YLHRC**) is a group of young lawyers and law students who are concerned with a variety of human rights issues in Australia and abroad.

YLHRC is grateful for the opportunity to make a submission to the Committee. We do not intend to address all of the amendments proposed by the Bill, but rather focus on the amendments that we consider impact on the Human Rights and Equal Opportunities Commission (**Commission**) ability to uphold human rights in Australia.

The YLHRC wishes to make the following submissions in relation to the Bill.

Changes to functions generally

It is proposed that the functions of the Commission are expanded to include the responsibility for disseminating information on human rights. This role, along with the Commission's existing responsibility to:

- promote an understanding and acceptance of human rights in Australia;
- undertake research and education for the purpose of promoting human rights; and
- prepare guidelines for avoiding acts or practices which are inconsistent with or contrary to any human right,

have been drawn together in the proposed new section 11(1) of the Bill and, according to the explanatory memorandum to the Bill, are intended to focus the new Commission's attention on these functions.

Whilst the YLHRC agree that it is important for Australia's federal human rights institution to play an integral role in education about, and promotion of human rights in Australia, we submit that it is imperative that a new focus on these responsibilities should not impact on, or detract, from the other roles of the Commission, particularly its ability to intervene in proceedings that involve human rights issues as discussed below.

Power of the Commission to intervene

Proposed Amendments

The current *Human Rights and Equal Opportunity Commission Act* 1986, as well as the *Racial Discrimination Act* 1974, the *Sex Discrimination Act* 1984 and the *Disability Discrimination Act* 1992 (the **HREOC Acts**), all contain provisions that allow the Commission to intervene in proceedings, with leave of the court, if the proceedings involve human rights and discrimination issues. The Commission states that it has used this function approximately 35 times since 1986, only 17 of those being in the Commonwealth or State courts, the 18 being in matters before various tribunals. We understand that to date the Commission has never been denied leave to intervene.

Under the proposed amendments, the Commission would not be able to intervene without approval from the Attorney General (unless the President of the Commission is, or was immediately before his or her appointment, a federal judge). Some of the matters which the Attorney General will take into account in considering whether to give the Commission approval to intervene include:

- whether the Commonwealth has already intervened in the proceedings;
- whether, in the Attorney General's opinion, the proceedings may affect to a significant extent the human rights of, or involve significant issues of discrimination against, persons who are not parties to them;
- whether, in the Attorney General's opinion, the proceedings have significant implications for the administration of the HREOC Acts;
- whether, in the Attorney General's opinion, there are special circumstances such that it would be in the public interest for the Commission to intervene.

The Attorney General is not limited to these matters and may have regard to any other matters he or she sees fit.

The YLHRC submits that placing these restrictions on the ability of the Commission to intervene in cases concerning human rights undermines the independence of the Commission and shows disdain for the competency and extensive knowledge the Commission has in respect of human rights jurisprudence, and how this knowledge has benefited Australian courts in the past.

The YLHRC is further concerned that conflicts of interest may arise should the Commission wish to intervene in a case where the Commonwealth is a party. In these instances, the YLHRC would like to see the Commission retain the unfettered discretion to intervene with leave of the Court.

Previous attempts to reduce Commission's power to intervene

The Senate Legal and Constitutional Committee's report on this proposal in 1998, which was then put forward under the *Human Rights Legislation Amendment Bill (No 2)*, recommended that the 1998 bill be amended so that the Commission's intervention power remains free of the need for approval by the Attorney General. This conclusion was after numerous submissions highlighted the following:

- there is no evidence of abuse by the Commission of its power;
- the amendments threaten the Commission's independence and may constitute a conflict of interest for the Attorney General;

- the Commission's intervention in court proceedings is of assistance to the courts;
- it is the courts' role to determine who may intervene.

YLHRC does not intend to discuss these issues again in detail, as they were very thoroughly addressed in the broad range of submissions made in 1998. As discussed in the Senate Legal and Constitutional Committee's report at that time, requiring the Commission to seek the Attorney General's permission to intervene adds unnecessary hurdles and complications to what has previously been an effective system of selective intervention.

In addition to the strong and valid arguments out in the 1998 submissions as to why the Commission should retain its power to intervene, we also believe that certain actions of the government since 1998 have heightened the need for Australia to show the international community, and reassure its own citizens, that it is committed to human rights. The proposed amendments come at a time when Australia's human rights record is being continuously questioned at an international and domestic level, and we submit that the maintenance of an independent federal human rights institution is imperative to avoid further disintegration of Australia's human rights reputation.

The YLHRC further submits that to allow a political figure, particularly one who has been as controversial in the area of human rights as Mr Williams, to have a veto power over the only federal human rights institution will significantly undermine the confidence the community has that the Commission is able to protect and uphold human rights in Australia.

If we look to the use of the power to intervene as used by the Commission, we see that on only 17 occasions the Commission has sought to intervene in proceedings. This would seem to indicate that the Commission does not abuse the privilege granted to it , therefore negating the need to fetter this power.

Protecting Australia's human rights reputation, and the human rights of Australians

Recent events have shown that a significant number of people within the legal community, and the Australian public, are not confident of the Commonwealth's ability (or willingness) to protect the human rights of its own citizens, and people that may be in Australia seeking protection from human rights abuses overseas.

There are rafts of legislation, supported by the government, which may raise issues in respect of human rights in the future. One such example is the implementation of measures introduced by the various Migration Legislation Amendment Acts. Another example is the changes proposed in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bills. . If the Government is able to silence the Commission in respect of these matters, not only will a great amount of experience and knowledge in respect of Australia's human rights obligations be inaccessible, but the confidence of the Australian public in the Commission, and indeed in the Government itself, will be weakened.

The intervention of the Commission to date shows that it has shown great care in choosing when to exercise its powers to intervene. The Commission has contributed to important cases concerning the rights of the child[1], the rights of refugees and immigration detainees[2],

[1] *Re a Teenager* (1988) 94 FLR 181; *Secretary, Department of Health and Community Services v. J.W.B and S.M.B* (1992) 175 C.L.R 218 (Marion's Case); *Re Marion [No.2]* (1994) FLC 92-448; *P v. P* (1995) FLC 92-615 and *Re Katie* (1996) FLC 92-659; *ZP v. PS* (1994) 68 ALJR 554.

freedom of speech[3] and racial discrimination. In some of these cases, including well known matters such as the Hindmarsh Island Bridge case[4] and the Teoh case[5], the Commonwealth also appeared and put a contrary view to the submission of the Commission.

Recently the Commission was granted leave to intervene in the Al Masri case[6] to make arguments in relation to human rights principles. The YLHRC has followed this case with great interest because of the importance it has for the protection of human rights of people detained in Australia. The Commission's submissions, which differed from those of the Commonwealth, were largely accepted by the Court. This intervention would be unlikely to be permitted under the new Bill. Moreover, intervention of such significance should not be subject to the policies or beliefs of the government of the day.

The YLHRC submit that for the reasons discussed in the 1998 submissions, and the reasons outlined above, the Commission's current intervention power must remain free of the need for approval by the Attorney General.

Restructure of the Executive

The YLHRC is concerned that by removing the portfolio-specific Commissioners and replacing them with a collegiate of 3 general Commissioners, the discreet groups currently benefiting from having a Commissioner, who is devoted to specific human rights and issues of discrimination, will most likely result in a diminution of this expertise. Under the Bill, the proposed 3 Commissioners will be required to have general expertise in human rights, but no specialised knowledge or understanding.

The area of human rights is extremely far reaching, such that it is impractical and unrealistic to desire generalist knowledge at the same level as the Commissioners current expertise. While the Government has provided examples where more co-operation between portfolios may be required, the YLHRC submits that nothing within the current structure prevents the development of a more co-ordinated approach to common issues.

In summary, the YLHRC is opposed to the changes contained in the Australian Human Rights Commission Legislation Bill for the reasons outlined above. The area of human rights is extremely important to our society, such that its only full-time protector cannot be sidelined and placed under the guard of the Attorney General. The Commission has been the only institution allowed to protect human rights in the court system, a power which has been used only when deemed necessary, and its contribution to the development of human rights jurisprudence has been invaluable. The YLHRC strongly urges this committee to look closely at all the effects these changes will have on the state of human rights in Australia.

If there are any queries, please do not hesitate to contact the Chair of the NSW Young Lawyers Human Rights Committee, Ms Renee Saibi, on 9921 4057 or 0414 332 554.

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[2] *Wu v. Minister for Immigration and Ethnic Affairs & the Commonwealth of Australia* (1996) 64 FCR 245, *C, L, J & Z v. Minister for Immigration and Ethnic Affairs, Mr M H Gerkens & Mr J Vrachnas* (unreported, O'Loughlin J, 30 March 1995)

[3] *Langer v. The Commonwealth* (1996) 186 CLR 302

[4] *Kartinyeri & Anor v The Commonwealth of Australia* (1997) 152 ALR 540

[5] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

[6] *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70*