national association of community legal centres

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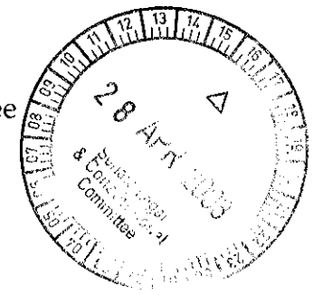

The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Submission
Australian Human Rights Commission Bill 2003

We write to express our views on several aspects of the Australian Human Rights Commission Bill 2003, recently introduced into the Parliament.

The Bill provides for significant amendments to the Human Rights and Equal Opportunity Act 1986. Most of these amendments would have a detrimental impact on the effective and independent operation of the Human Rights and Equal Opportunity Commission.

As a human rights "watchdog", it should be expected that on occasion the Commission would be critical of decisions and actions taken by the Government. That is in the public interest. The capacity to be critical should be welcomed, not curtailed, especially where the Government does not accept the criticism expressed. Governments always have the resources to respond to criticism. A system of robust oversight of and comment on the Government's own performance is a strength of any political system grounded in respect for individual freedom and human rights.

Attorney General's approval to intervene

The Commission now has the ability to seek to intervene in court proceedings in which issues of human rights may be raised. This capacity is critical to the Commission's work in safeguarding and advancing respect for human rights. The Commission seeks permission to intervene where it considers that the parties to the action may not adequately address human rights concerns.

The proposal to require that the Commission first obtain permission from the Attorney General before seeking to intervene in court proceedings is unacceptable. There is a clear potential for this requirement for prior political approval to be exercised to protect the position of the Commonwealth from criticism that it may have failed to respect human rights.

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We understand that the Commission has sought to intervene in a total of 35 cases over the 17 years of its existence (a rate of intervention which does not indicate any lack of restraint on the Commission's part) and that leave to intervene has been refused on only one occasion. This suggests that Courts have generally seen the submissions made by the Commission to be relevant and helpful.

We also note that of those 35 interventions, 18 cases have involved the Commonwealth as either a party to the proceedings, or as an intervener. On 16 of those 18 occasions, the Commission has adopted a contrary position to the Commonwealth, at least to some degree. It may be assumed that the Government is seeking to give the Attorney General authority to veto the Commission's applications to intervene so that the veto would be used to protect the Commonwealth's position (as party or intervener) in at least many cases.

Where the Commonwealth is a party to proceedings (and even in some cases where it is not), determining whether or not to permit intervention must involve a conflict of interest for the Attorney General. It is improper for one party in proceedings to be given a power of veto over the participation of other potential parties.

We note that the ability to intervene is not a power enjoyed absolutely by the Commission. The Commission can only request permission to intervene; it must be granted leave by the Court hearing the matter. The Bill's proposed change to these arrangements would substitute the Attorney General's discretion for that of the Court, in itself undermining judicial independence and challenging the separation of powers.

Specialist Commissioners should be retained

The Commission's present structure, with five portfolio Commissioners (Human Rights, Sex Discrimination, Race Discrimination, Disability Discrimination and Aboriginal and Torres Strait Islander Social Justice), is preferred to the alternative of three generic Commissioners proposed under the Bill.

Specialisation encourages consistency in complaint handling. It allows the Commissioners and Commission staff to develop greater expertise in addressing particular patterns or manifestations of discrimination. Specialisation creates more favourable opportunities to develop close connection with particular communities and with relevant government and non-government agencies.

The social, political and other human rights issues affecting each of the present five specialist portfolios are not interchangeable, despite obvious areas of overlap.

"Mainstreaming" the work of the Commission to generalist Commissioners will increase the scepticism of minority groups that their particular issues will less well understood and addressed. Generalist services typically overlook the specific needs of specific communities.

And there is no justification for reducing the number of Commissioners from five to three.

Complaint Commissioners

We oppose the proposal to allow the appointment of part-time Complaint Commissioners.

This could undermine the effectiveness of the Commission by detracting from the authority of the existing Commissioners.

Where there are difficulties in the Commission meeting its workload, these can be addressed by providing additional resources to allow the Commission to employ more staff.

If part-time Commissioners *are* to be appointed, they should enjoy some security of tenure, again so as to maximise the independence of the Commission from government. They should not be subject to immediate termination by the Attorney General.

Recommendations power

The Commission presently has the power to make recommendations in matters, which proceed to hearing, including recommendations for money compensation.

We understand that these recommendations are not enforceable in respect of most respondents to complaints, with the notable exception of the Commonwealth. We understand that there is an argument that recommendations for compensation are binding on the Commonwealth. Even if that is not the case, it has always been the *practice* for the Commonwealth to comply with Commission recommendations to pay compensation.

It is self-serving for the Bill to remove the obligation on the Commonwealth to pay compensation.

Change of name

We support the proposed change of the Commission's name to the "Australian Human Rights Commission".

The proposed name is less cumbersome than the present name, and reflects the existing common usage.

"Human rights – everyone's responsibility"

The Bill requires that the Commission promote the slogan "Human Rights – Everybody's Responsibility". Requiring an agency to adopt a particular slogan would be a remarkable provision in *any* legislation. The Bill also provides that the Commission "may" incorporate the slogan in its letterhead and logo. Surely the Commission can determine its own slogans and letterhead designs without this micro-management by legislation.

The slogan itself is underwhelming. It is uninspiring and ambiguous. Does it mean that human rights are an issue for everybody *except* the Government? If it is a (moral) responsibility for everybody, it is the particular (political) responsibility of nobody.

While there is probably a broad consensus that the Commission should give education about human rights a high priority, how the Commission pursues that task is a matter for the Commission. And community education is not a sufficient remedy for the abuse or neglect of human rights, which arise from entrenched, institutional discrimination and inequality.

The Bill reflects an apparent Government attitude that education about human rights should replace other, perhaps more contentious, activity. This proposal in the Bill seems designed to require the Commission to devote more time and resources to education campaigns and less time and resources to inquiries and discrimination complaint handling.

It is our view that education about human rights can be delivered most effectively in the context of an active advocacy for and promotion of those rights by a body, which is genuinely independent of the Government of the day.

We thank you for the opportunity to comment on this Bill.

Yours faithfully,

L. O'B

Liz O'Brien
Convenor
National Association of Community Legal Centres