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23 April 2003

Ms L Gell
A/g Secretary
Australian Senate Legal and Constitutional Legislation Committee
Parliament of Australia
Parliament House
CANBERRA ACT 2600

Dear Ms Gell:

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

Thank you for the invitation to make a submission to the Senate Legal and Constitutional Legislation Committee's Inquiry into the Provisions of the Australian Human Rights Commission Legislation Bill 2003.

I enclose a submission to this inquiry on behalf of People with Disability Australia Incorporated and NSW Disability Discrimination Legal Centre Incorporated.

We would welcome an opportunity to discuss our submission further with the Committee should this be of assistance.

Yours sincerely


PHILLIP FRENCH
Executive Officer

Submission on behalf of
People with Disability Australia Incorporated
and
NSW Disability Discrimination Legal Centre Incorporated
to
Parliament of Australia
Senate Legal and Constitutional Legislation Committee
Inquiry into the provisions of the
Australian Human Rights Commission Legislation Bill 2003

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1 The Authors

1.1 People with Disability Australia Incorporated

People with Disability Australia Incorporated (PWD) is a national disability rights and advocacy organisation for Australians with disability and their associates. PWD's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWD also has a large associate membership of other individuals and organisations committed to the disability rights movement. PWD was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own. We have a cross-disability focus - we represent the interests of people with all kinds of disability. PWD is a non-profit, non-government organisation.

1.2 NSW Disability Discrimination Legal Centre Incorporated

NSW Disability Discrimination Legal Centre Incorporated is a specialist community legal centre which assists people with disability to exercise their rights under the *Disability Discrimination Act 1992* (Cth). The Centre provides legal information, advice and referral services, community and continuing legal education, and undertakes legal policy analysis and advice, and strategic casework, in relation to disability discrimination in Australia.

2. Executive Summary

- 2.1 People with Disability Australia Incorporated and NSW Disability Discrimination Legal Centre Incorporated are opposed to key provisions of *Australian Human Rights Commission Legislation Bill 2003*. We do not believe it ought to be enacted in its current form.
- 2.2 Our primary objections to the Bill are:
- (a) It would abolish the roles of specialist portfolio Commissioners in the areas of disability discrimination, sex discrimination, race discrimination, and Aboriginal and Torres Strait Islander Social Justice. We believe this measure is contrary to the interests of those classes of person protected by Australian human rights and anti-discrimination law. It would result in a serious loss of executive level leadership, expertise, policy capacity, and identification with the Commission among protected classes.
 - (b) It would amend the Commission's intervention function to require the Commission to obtain the approval of the Attorney General for any proposed intervention in legal proceedings that raise human rights or discrimination issues that fall within the Commission's jurisdiction. We believe this measure contravenes the *Paris Principles*. It would compromise the independence and integrity of the Commission, expose it to political interference in the performance of its functions, and undermine public confidence in its operations.
- 2.3 We also have a number of secondary concerns about the Bill:
- (c) The Bill seeks to re-focus the Commission's functions to give greater legislative priority to the dissemination of information and education on human rights. While disseminating information, and educating the public about human rights, are appropriate functions for the Commission, they must be appropriately balanced with the Commission's complaint handling,

compliance, investigation and policy functions. We are strongly opposed to the suggestion that the Commission will now subordinate these latter functions to information dissemination and education functions.

- (d) The Bill amends the objects of the substantial and satellite Acts to include as an object of the legislation the preparation and publication of guidelines for avoiding acts or practices that result in unlawful discrimination, or which are not in accord with human rights. We support this measure in principle. However the Bill fails to clarify the status of any such guidelines under Commonwealth law. The Bill ought to be amended to provide this clarity to avoid future difficulties in the administration and interpretation of the Commonwealth's human rights and anti-discrimination legislation.
- (e) We are not opposed, in principle, to those provisions of the Bill that permit the Attorney General to appoint a Complaints Commissioner (or Commissioners) to whom the President may delegate the complaint handling function. However, we are concerned that the Bill fails to set out appropriate qualifications for this position, other than that the person appointed is a legal practitioner. We are also concerned that the Bill is contrary to the *Paris Principles* in that it would permit the Attorney General to terminate the appointment of a Complaint Commissioner at any time. This has significant potential to undermine the independence of the Commission, and make it vulnerable to political interference in the performance of its functions.
- (f) We are concerned that the Bill would repeal those provisions of the *Human Rights and Equal Opportunity Act, 1986* that provide for the establishment of advisory committees to the Commission. The establishment of advisory committees has significant potential to assist the Commission in the performance of its functions. While other consultative arrangements will no doubt be continued by the Commission, such consultative arrangements do not have the special consultative status that an advisory committee would allow, particularly in relation to sensitive and confidential matters, and are therefore unlikely to produce the same level of advice.

3. Comments on Key Provisions of the Bill

3.1 Name of the Commission, and associated by-line

3.1.1 The Bill proposes that the name of the Human Rights and Equal Opportunity Commission be changed to the "Australian Human Rights Commission." We support this proposal. The proposed new name appropriately gives the Commission a national identity and focuses on its central concern – human rights. It is consistent with nomenclature for human rights institutions internationally. We commend the government for addressing community concerns about its former proposal for a name change to the Commission.¹

3.1.2 The Bill proposes the establishment of a by-line for the Commission – *Human rights – everyone's responsibility*. We support this proposal. This revised approach to the incorporation of the concept that all Australians have a responsibility to respect human rights into the 'branding' of the Commission, avoids the pitfalls of the previous approach.²

3.2 Executive structure of the Commission

3.2.1 The Bill proposes the abolition of specialist portfolio Commissioners in the areas of disability discrimination, sex discrimination, race discrimination and Aboriginal and Torres Strait Islander Social Justice in favour of three generalist human rights commissioners. We are strongly opposed to this proposal. In his Second Reading Speech the Attorney General states that the rationale for this proposed change is that it will provide the Commission with:

a strengthened collegiate approach, [which] will assist the commission in reaching the broad spectrum of Australians ...

¹ In this Bill's predecessor, the *Human Rights Amendment Bill No 2*, (1998), the Government proposed that the Commission's name be changed to the 'Human Rights and Responsibilities Commission.'

² Parliament of Australia, Senate Legal and Constitutional Committee, Inquiry into Human Rights Amendment Bill (No.2) 1998, Chapter 5; see evidence of Women's Electoral Lobby and Professor Hilary Charlesworth and Associate Professor McCorquodale in particular; www.aph.gov.au/senate/committee/legcon_cttee/human2/report/c05.htm

The human rights commissioners and the president will have a common responsibility to protect and promote human rights for all Australians...

These reforms take into account the possibility of new areas of commission responsibility (such as age discrimination), the fact that human rights issues increasingly cross over the portfolio specific boundaries of the existing structure (such as issues relating to women with disabilities), and the social and economic environment that faces all levels of government and business.³

3.2.2 With respect to the Attorney General, this rationale misconceives the role and functions of the Commission. While respect for human rights is the responsibility of all Australians, not all Australians are equally vulnerable to the abuse and neglect of their human rights. The Commission must prioritise its attention to those individuals and groups most vulnerable to abuse or neglect of their human rights, including those classes of persons that are the subject of specific statutory protection under Commonwealth human rights and anti-discrimination legislation. If there were not specific groups of people in the Australian community likely to be subject to abuse or neglect of their human rights, there would be little need for an Australian Human Rights Commission. It therefore follows that in order to properly perform its role, the Commission requires an executive structure that concentrates attention on those groups most frequently subject to human rights abuse or neglect, and for whom specific statutory protection has been enacted.

3.2.3 We also note in this context that the *Paris Principles (principles relating to the status of national [human rights] institutions⁴* require:

Composition and guarantees of independence and pluralism

The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection of human rights...

³ Parliament of Australia, House of Representatives, Hansard, *Australian Human Rights Commission Legislation Bill 2003*, Second Reading Speech of the Hon Daryl Williams, MP, Attorney General 27 March 2003; www.aph.gov.au

⁴ *Paris Principles* (principles relating to the status of national institutions; www.hreoc.gov.au). (legal information see par 3.4.10 of this submission for further explanation of the *Paris Principles*.)

The *Paris Principles* do not prescribe the means by which this requirement is to be met. However, it is our view that the requirement for pluralist representation should be read with reference to the specific human rights and anti-discrimination jurisdictions administered by the Commission. A specialist portfolio Commissioner approach is more likely to achieve the pluralist composition of the Commission sought under the *Paris Principles*.

3.2.4 The Attorney General appears to be suggesting that in future additional jurisdiction, such as age discrimination, will be added to the Commission's portfolio without any enhancement to the Commission's executive structure, and possibly, to its complaint handling, policy and administrative support services. If so, this is a matter of considerable concern. The resources available to the Commission, which have been reduced by more than 50% since 1996,⁵ are already spread very thin. Should the Commission's jurisdiction be further expanded without additional resources to support activity in the new area, there is a very real possibility that the Commission will be unable to perform its functions to even a minimum acceptable standard. We are most concerned that it will be those more complex and less publicly popular or prominent areas of jurisdiction, such as disability discrimination, that are most likely to suffer from unfunded increases in the Commission's jurisdiction. Resources will simply not be available to undertake the intensive policy and compliance work required by these jurisdictions. We therefore believe the Government's proposed approach to the expansion of the jurisdiction of the Commission ought to be reconsidered so as to ensure that there is appropriate executive leadership in any area of additional jurisdiction, as well as sufficient resources to support complaint-handling, information, education, policy, and administrative functions in the new jurisdiction.

3.2.5 We agree that human rights issues commonly occur at the intersections of portfolios, and that where they do the Commission ought to be capable of responding to these issues in an integrated or seamless way. However, it is

⁵ In financial year 1995-1996 the Human Rights and Equal Opportunity Commission's appropriation was \$21.6million dollars. In the 2001-02 financial year the appropriation had been reduced to \$10.7million: see Human Rights and Equal Opportunity Commission Annual Reports for 1996 and 2001; www.hreoc.gov.au; (publications).

not necessary to abolish the specialist portfolio Commissioners to achieve this result. Joint work can be undertaken in an area by more than one portfolio specific Commissioner, or Commissioners can agree that one member of the college will deal with an issue and in doing so deal with it in all aspects. This is a simple matter of cooperation and coordination between portfolios. It would be unreasonable to forgo all of the benefits of portfolio specific Commissioners simply to achieve better cooperation and coordination at the intersections of the Commission's jurisdictions.

3.2.6 We assume the Attorney General's reference to the 'economic environment facing government' means that the Government seeks a more economical executive structure for the commission in light of budget constraints, and in line with the outcome of the Tripartite Review of the Human Rights and Equal Opportunity Commission, which apparently concluded that the Commission was "top heavy."⁶ As noted by the Legal and Constitutional Committee in its review of *Human Rights Amendment Bill No.2 (1998)*, the Attorney General has also made public statements that suggest a concern about the number of executive staff employed by the Commission.⁷

3.2.7 It is difficult to comprehend or debate the outcomes of the Tripartite Review of the Human Rights and Equal Opportunity Commission when its findings have never been publicly released. Should the outcomes of this Review provide the rationale for major structural change to the Commission, the Government really ought to make the Review's final report public to facilitate greater understanding and debate about its proposed directions. Failure to do so only undermines public confidence in the Government's administration of the Commission.

3.2.8 It is incumbent on the Government of any mature democracy to ensure that adequate structures and resources are available to protect and promote the

⁶ The so-called Tripartite Review of the Human Rights and Equal Opportunity Commission commenced in 1993 and was finalised in 1995. The Review was undertaken jointly by officers of the Attorney General's Department, the Department of Finance and the Human Rights and Equal Opportunity Commission. The Report has never been made public.

⁷ Parliament of Australia, Senate Legal and Constitutional Committee, *op cit* (Chapter 3) at par 3.3.

human rights of marginalised and vulnerable population groups within its community. The resources required to support an adequate level of functioning of the Commission, including a robust specialist executive structure, are not great in governmental terms.

3.2.9 Compliance with human rights and anti-discrimination measures will sometimes require major structural responses from the Australian community. This is particularly the case with respect to disability discrimination, which has significant structural aspects. It is therefore essential that the Commission has specialist executive level leadership in each major area of jurisdiction to enable it to effectively engage with leaders in industry, commerce, and government (etc), at a sufficient level to negotiate structural change to eliminate or reduce discrimination, or abuse or neglect of human rights. The current positions of specialist portfolio Commissioners have this status.

3.2.10 It is not clear from the Bill how the work of the President and Human Rights Commissioners will be divided and prioritised across each jurisdiction. In this respect, the current proposal is even less acceptable than the Government's proposed re-organisation of the Executive structure of the Commission under *Human Rights Amendment Bill (No.2) 1998*.⁸ There is significant potential for the President's and Human Rights Commissioners' work, collectively, to focus around specific, more 'popular' or publicly prominent jurisdictions or issues – eg Aboriginal and Torres Strait Islander social justice or refugee issues – at the expense of other less popular and publicly prominent areas of jurisdiction, such as disability discrimination.

3.2.11 We are also concerned that under the executive structure proposed in this Bill, there is significant potential for work in less publicly popular or prominent areas of jurisdiction, such as disability discrimination, to be undertaken at a non-executive level of the Commission. This will make it very difficult to

⁸ Under Human Rights Amendment Bill No. 2 (1998) the Government proposed designated portfolios in the areas of social justice and race; sex discrimination and equal opportunity; and human rights and disability.

engage with major respondent groups at a sufficiently high level to negotiate structural change.

3.2.12 The specialist portfolio Commissioners significantly contribute to the Commission's specialist capacity and expertise in each area of jurisdiction. They are not intended as titular positions with merely formal responsibilities. For the Commission to fulfil the objects of Commonwealth human rights and anti-discrimination legislation, the Commissioners must be subject-matter specialists, personally involved in the detailed internal programmatic work of the Commission, as well as being its public face on particular issues. Additionally, application of the Commonwealth's human rights and anti-discrimination law can be complex and contentious, requiring a high degree of subject-matter expertise, sensitivity to the interests of protected classes, and a capacity to manage competing stakeholder interests. We are concerned that the executive structure proposed in this Bill has significant potential to result in generalist Human Rights Commissioners having carriage of critical issues that are beyond their level of expertise. This is likely to impact negatively in some areas of jurisdiction more than others due to the varying scope and complexity of Commonwealth human rights and anti-discrimination legislation. In our assessment it presents very grave risks in the disability discrimination jurisdiction due to its scope and complexity.

3.2.13 We note the Attorney-General's statement in his Second Reading Speech that:

In addition to the requirements for individual expertise, knowledge or experience, the bill will require that the president and human rights commissioners, as a group, have expertise in matters likely to come before the Commission.⁹

This commitment is given legislative effect under clause 19 of the Bill. With respect to the Attorney General, it is difficult to see how such an objective can be achieved in practice. There are already more areas of jurisdiction than there will be positions in the proposed executive structure of the Commission.

⁹ Parliament of Australia, Legislative Assembly, Hansard, op cit

This situation will be exacerbated if more areas of jurisdiction, such as age discrimination, are added to the Commission's portfolio. While it is certainly possible for a candidate for appointment to the position of President or Human Rights Commissioner to have expertise in more than one of the Commission's jurisdictions, this is less likely to be the case in the Commission's more complex areas of jurisdiction, such as disability discrimination in particular. The more expert a candidate for appointment is in a particular jurisdiction, the less likely they are to satisfy the generalist qualifications necessary for appointment to the generalist role. In our view this provision will therefore operate against, rather than in favour of, the appointment of subject matter specialists.

3.2.14 It is also critical to the Commission maintaining the confidence of those classes of person protected by Commonwealth human rights and anti-discrimination law that officers with personal characteristics and backgrounds that broadly reflect the profile of each protected class constitute its executive. It would be inappropriate for a non-indigenous person to exercise executive leadership within the Commission on indigenous issues (in light of the importance of the principle of self-determination to indigenous Australians), or for a male to have executive leadership in the area of sex discrimination (which primarily affects women). Similarly, it is highly preferable that executive leadership in the area of disability discrimination is exercised by an otherwise appropriately qualified person with disability. It is very helpful to the Commission's work if there is concordance between 'the message and the messenger.' The proposed generalist executive structure of the Commission will militate against this and undermine the Commission's position with protected classes, potentially exposing its executive to ridicule for their lack of identification with protected classes.

3.2.15 The title of each specialist Commissioner also provides an important point of identification with the Commission among protected classes. It has an important symbolic aspect for protected classes, in that the nomenclature specifically affirms and recognises the status of particular protected classes as 'right-bearers' under legislation. This is particularly the case in the disability

discrimination jurisdiction. The significance of this cannot be overestimated, and must be assessed in light of the extremely marginalised status of particular classes of person protected by Commonwealth human rights and anti-discrimination legislation, including people with disability, and the meaning that is attached to a visible 'champion' of their interests.

3.3 Central functions of the Commission

- 3.3.1 The Bill proposes a re-focusing and enhancement of the Commission's functions to give greater legislative priority to education and the dissemination of information on human rights. While disseminating information, and educating the public about human rights are appropriate functions for the Commission, they must be appropriately balanced with the Commission's complaint handling, compliance, investigation and policy functions. We are strongly opposed to the suggestion that the Commission will now subordinate these latter functions to information dissemination and education functions. The Commission must retain a strong, independent, policy activist and watchdog role in relation to human rights and anti-discrimination issues within its jurisdiction.
- 3.3.2 The Commission continues to deal with nearly 1300 complaints alleging human rights abuse or discrimination every year. In the 2001-02 financial year 36% of complaints were on the ground of disability discrimination, and both the number and percentage of disability discrimination complaints handled by the Commission annually continues to rise.¹⁰ It does not appear that additional resources will accompany the re-focusing of the Commission's functions.¹¹ Any increase in activity in these areas must therefore be met within the Commission's existing budget, which is already stretched. It is essential that a new emphasis on information dissemination and education does not reduce the Commission's capacity to effectively perform its complaint-handling function.

¹⁰ Human Rights and Equal Opportunity Commission, Annual Report 2001/02 chapter 2 Complaint Handling Section: www.hreoc.gov.au (publications).

¹¹ The Bill's Explanatory Memorandum states that the measures set out in the Bill are budget neutral.

- 3.3.3 In the area of disability discrimination the Commission must also retain a capacity to participate in the development of Standards and to promote and advise on the development of agency Action Plans to reduce or eliminate discrimination under ss 31 and 60 respectively of the *Disability Discrimination Act*, 1992 (Cth). Additionally, the Commission must retain the capacity to consider applications for temporary exemptions from the Act under s 55. These are substantial compliance activities that ought not to be subordinated to information dissemination and education functions.
- 3.3.4 As part of the proposed refocusing of the functions of the Commission, the Bill amends the objects of the substantial and satellite Acts to include as an object of the legislation the preparation and publication of guidelines for avoiding acts or practices that result in unlawful discrimination, or which are not in accord with human rights. We support this objective in principle. However the Bill fails to clarify the status of any such guidelines under Commonwealth law. It is not clear from the Bill, or associated interpretive documents, if these guidelines are to have the status of regulations. We note that the production of guidelines under the Act are likely to fall within the definition of 'regulations' set down by the Office of Regulation Review, and therefore are likely to require the development of Regulatory Impact Statements etc.¹² Even if that is not the intention of the Bill, that may be its effect. The Bill ought to be amended to clarify the position to avoid future difficulties in the administration and interpretation of the Commonwealth's human rights and anti-discrimination legislation.

3.4 Commission's independent power to intervene in Court proceedings

- 3.4.1 The Bill would require the Commission to seek the approval of the Attorney General for any intervention in legal proceedings that raise human rights or discrimination issues within the Commission's jurisdiction. Where the

¹² The Office of Regulation Review defines regulations as "... any laws or other government 'rules' that influence the way people behave" cited in Department of Industry, Tourism and Resources, *A Best Practice Guide or Considering Business Regulation* Commonwealth of Australia 2002 at 4.

President is, or was immediately prior to being appointed, a federal judge, the Commission must instead provide written notice and reasons to the Attorney General about its proposed intervention while there is still a 'reasonable period' before it seeks leave to intervene. In determining whether to grant approval for an application for leave to be made, the Attorney General may have regard to certain matters set out in the Bill, but is not bound by these matters. He (or she) has an unfettered discretion to approve or refuse the application for leave to intervene being made. In his Second Reading Speech, the Attorney General states that the purpose of this amendment is to:

...ensure that the intervention function is only exercised after the broader interests of the community have been taken into account.

The requirement is not intended to prevent court submissions that are contrary to the government's views, but rather to prevent duplication and the waste of resources and to ensure that court submissions accord with the interests of the community as a whole.¹³

We are strongly opposed to this proposal.

3.4.2 Under Australian law the duty of determining who has a legitimate right of intervention in legal proceedings lies with the Court. To prevent an abuse of process, the Courts have elaborated rules against which applications for leave to intervene are assessed. The Attorney General's proposal therefore represents an entirely unnecessary interference in the legal process, and puts at risk the separation of powers between the Government and the judiciary, and the independence of the judicial system.

3.4.3 Any successful intervention in proceedings before a Court results in the Commission becoming a party to the proceedings. The Commission is thereby exposed to an adverse costs order. This represents a further disincentive to any unmeritorious or insubstantial application to intervene.

3.4.4 In determining whether or not an applicant ought to be granted leave to intervene, the Court will have regard to the submissions that the party seeks to

¹³ Parliament of Australia, Legislative Assembly, Hansard, op cit.

make. Where an applicant merely seeks to present views on the law or merits of a case that are already before the Court by virtue of the submissions of other parties, the Court will typically refuse to grant leave to intervene. Should another party to the proceedings believe that the Commission's intervention is unmeritorious or duplicative they also have a right to oppose the intervention and argue the issue before the Court. This course is already open to the Attorney General where the Commonwealth is a party to proceedings, and believes the Commission's intervention will result in duplication. There is therefore no basis for the Attorney General's view that he requires the power to approve or refuse the Commission's intervention in legal proceedings to avoid duplication in submissions.

3.4.5 The Commission has already elaborated a set of *Guidelines*¹⁴ for the exercise of its power to intervene in legal proceedings. These *Guidelines* ensure, inter alia, that:

4. *The intervention issues should be significant and not peripheral to the proceedings.*
5. *The Commission should put the intervention issues before the court only if these issues are not proposed to be put before the court by the parties to the proceedings or not adequately or fully so argued.*
6. *Notice of intention to seek leave to intervene in the proceedings should be given to all parties prior to the hearing with an indication of the intervention issues to be argued. In the event that a party then decides to fully raise or adopt the proposed intervention issues, the Commission will only press its application to intervene if the party then decides not to argue those proposed intervention issues, or if the party particularly seeks the support of the Commission (in such cases submissions in written form may be sufficient).*
7. *Notice of the Commission's intention to seek leave to intervene (and reasons why the Commission considers it reasonable to do so) must be given to the Attorney General's office and to the Manager of the Human Rights Branch of the Attorney General's Department as soon as practicable after the Commission has decided to intervene in the proceedings.*

The *Guidelines* provide strong evidence that the Commission's power to intervene is used judiciously, and only in circumstances where there are

¹⁴ Human Rights and Equal Opportunity Commission, *Guidelines on applications for interventions in Court proceeding*, www.hreoc.gov.au/legal/interventions_in_court_proc.html

important human rights or discrimination issues raised in the matter before the Court that will not be dealt with appropriately by other parties. Additionally, the *Guidelines* already ensure that the Attorney General and Attorney General's Department are given notice of the Commission's intention to seek leave to intervene, and reasons for it. The amendment to the Commission's intervention powers proposed in this Bill is therefore unnecessary.

3.4.6 Since its establishment in 1986, the Commission has sought to intervene in 35 legal proceedings. Leave has been granted in each case; an application has never been refused; an application has never been the subject of adverse comment by a Court; nor has the Commission ever been subject to an adverse costs order. To the contrary, as noted in the Committee's *Inquiry into Human Rights Amendment Bill No 2 (1998)* in a number of cases Courts have reflected very favourably on the assistance they have received from the Commission's submissions.¹⁵ This is compelling evidence that the Commission uses its intervention powers responsibly.

3.4.7 In a number of cases in which the Commission has intervened, the Commonwealth has been a party to the proceedings, and has adopted a position different to that adopted by the Commission. Where the Commonwealth is a party to proceedings, the Attorney General, as First Law Officer of the Commonwealth, has a conflict of interest in determining whether to approve or refuse permission for an application for leave to intervene to be made by the Commission. The Attorney General is also a member of the Cabinet. As noted in this Committee's inquiry into *Human Rights Amendment Bill No.2 (1998)*, the current Attorney General has himself stated that:

*There is little or no expectation on the part of the public that the attorney will act independently of his or her cabinet colleagues ... it ought to be concluded that the perception that the attorney-general exercises important functions independently of politics and in the public interest is either erroneous or at least eroded.*¹⁶

¹⁵ Parliament of Australia, Senate Legal and Constitutional Committee, op cit (Chapter 2)

¹⁶ Ibid, quoting paper entitled *Who speaks for the Courts?* Presented by the Attorney General to the Courts in a Representative Democracy Conference, September 1995, at 8.

The public therefore has every reason to be concerned that should the Attorney General be provided with the power to approve or refuse a proposal for the Commission to apply to intervene in a matter before a Court that power may be exercised for political purposes. These conflicts of interest would compromise the independence and integrity of the Commission. They have the potential to result in its functions being exercised in a partial, or even politically partisan, manner. This would severely undermine public confidence in the Commission, and erode its reputation and stature as a human rights watchdog, both within Australia and internationally.

3.4.8 It is not the role of the Commission to assess what may be in accord with the interests of the community as a whole. Its role is to consider and advocate the specific interests of those classes of person protected by Commonwealth human rights and anti-discrimination law – those groups that are tend to suffer at the hands of majoritarian political and social forces. At times, this will inevitably and properly result in the Commission opposing the views and interests of powerful sections of the community, including executive government. Human rights, in one sense, are a constraint on the exercise of Executive and majoritarian power. It is therefore most improper to propose that the Commission's intervention function should be exercised subject to the approval of Executive government.

3.4.9 Additionally, it is the role of the Court in legal proceedings to determine the competing claims of the parties in light of the laws set down by Parliament, and the common law. That is the essence of the Rule of Law in our democracy. It is therefore most inappropriate for the Attorney General to suggest that he has the role of ensuring that the Commission's court submissions accord with the interests of the whole community, anterior to the legal process. It represents an interference with the Rule of Law.

3.4.10 The *Paris Principles*, inter alia, set out international minimum standards of independence for the operation of national human rights institutions. Australia has played a key role in the development of the *Paris Principles*, and has been the principal sponsor of the annual resolutions of the United National

Commission on Human Rights and the United Nations General Assembly that reaffirm the need for national institutions to comply with the *Principles*.¹⁷ The Principles state:

Methods of Operation

Within the framework of its operation, the national institution shall:

- (a) *Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;*¹⁸

Clearly, the proposal to make the exercise of the Commission's intervention power subject to the approval of the Attorney General violates the fundamental tenets of the *Paris Principles*. If enacted, this proposal would mean that Australia would fail to meet international minimum standards for independence in the operation of human rights institutions.

3.4.11 As noted above, Commonwealth human rights and anti-discrimination law can be complex in its application. This is particularly so in the area of disability discrimination, where undefined concepts and tests such as "unjustifiable hardship," "reasonableness," and "reasonable adjustment" apply. Additionally, in many respects, Commonwealth human rights and anti-discrimination law remains unelaborated and unsettled by case law. A litigant, particularly in the disability discrimination jurisdiction, therefore often faces a very onerous burden in terms of evidence and legal argument. This burden is now more acute than ever due to the transfer of the determination function to the Federal Court of Australia and Federal Magistracy, and the decline in the availability of legal aid. The Commission's intervention role can therefore be of the greatest assistance to the Court and to the parties to a dispute by placing before the Court material which the parties are incapable of generating personally. This role can be especially helpful in redressing imbalances in relative party

¹⁷ Human Rights and Equal Opportunity Commission, Submission to Senate Legal and Constitutional Committee, Inquiry into Human Rights Amendment Bill No.2 (1998) at 1.

¹⁸ Paris Principles – principles relating to the status of national institutions – competence and responsibilities.

capability, particularly in circumstances where litigants may be unrepresented, and/or where respondents are major corporations with extensive resources.

3.5 Commission's power to recommend payment of damages or compensation

3.5.1 The Bill will remove the Commission's power to recommend the payment of damages or compensation following inquiries into certain types of complaints under the amended *Australian Human Rights Commission Act, 1986*. These recommendations are currently unenforceable. We do not object to this proposal on the basis that it is consistent with the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*,¹⁹ which held that the Human Rights and Equal Opportunity Commission, as an administrative body, cannot exercise determinative powers, without offending Chapter 3 of the Australian Constitution.

3.6 Appointment of part-time Complaints Commissioners

3.6.1 The Bill would enable the Attorney General to appoint part-time Complaints Commissioners to whom the President would be able to delegate complaint-handling functions. We support this proposal in principle, and note that it potentially resolves previous concerns about the workload and potential bottleneck created by centralising complaint handling functions in the office of President, and removing the President's power of delegation of the complaint-handling function to other Commissioners. We do, however, have two serious concerns about the proposal.

3.6.2 The Bill does not specify the qualifications required to fulfil the role of Complaint Commissioner, other than that he or she is to be a legal practitioner (clause 42A(1)). In our view the Bill ought to set out other qualifications and attributes that must be satisfied by candidates for appointment to the position. These ought to include a detailed knowledge and experience of human rights and anti-discrimination issues that fall within the Commission's jurisdiction.

¹⁹ 183 CLR 245

3.6.3 We are also very concerned that the Bill, if enacted, would allow the Attorney General to terminate the appointment of a Complaint Commissioner at any time (clause 42A(3)(b)). This power is contrary to the *Paris Principles* which require:

Composition and guarantees of independence and pluralism

3. *In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate.*²⁰

3.6.4 In order to ensure the independent exercise of the complaint handling function, which may at times involve serious and potentially politically sensitive complaints against the Commonwealth Government, is it essential that Complaint Commissioners have appropriate protection of tenure. The Bill does not currently provide this. This has significant potential to undermine the independence of the Commission, and make it vulnerable to political interference in the performance of its functions. As currently drafted, it would permit the Attorney General to remove, on an arbitrary basis, and for political reasons, a Complaint Commissioner in the midst of dealing with a complaint that may be causing political embarrassment to the Government.

3.7 Community Relations Council and advisory committees

3.7.1 The Bill would repeal those provisions of the *Human Rights and Equal Opportunity Act, 1986* that provide for the establishment of advisory Committees to the Commission. We are opposed to this proposal.

3.7.2 We are aware that these provisions have only been utilised on one occasion. However, that is a matter for regret. The establishment of advisory committees has significant potential to assist the Commission in the performance of its functions. While the Commission will no doubt continue other consultative arrangements, such arrangements do not have the special consultative status that an advisory committee would allow, particularly in

²⁰ *Paris Principles*, op cit.

relation to sensitive and confidential matters, and are therefore unlikely to produce the same level and timeliness of advice. It is our view that those provisions that permit the appointment of advisory committees ought to be retained in the legislation and utilised by the Government.

4 Recommendations

4.1 Principal recommendation

We recommend that the Senate Legal and Constitutional Legislation Committee recommend against the enactment of *Australian Human Rights Commission Legislation Bill 2003* in its current form.

4.2 Other recommendations

4.2.1 We recommend that the Senate Legal and Constitutional Legislation Committee recommend that the *Australian Human Rights Commission Legislation Bill 2003* be amended to retain as part of the executive structure of the Commission specialist portfolio commissioners in the areas of race, gender equality, indigenous human rights, and disability.

4.2.2 We recommend that the Senate Legal and Constitutional Legislation Committee recommend that the *Australian Human Rights Commission Legislation Bill 2003* be amended to give appropriate weight to the Commission's complaint handling and compliance functions, in addition to its information and education functions.

4.2.2 We recommend that the Senate Legal and Constitutional Legislation Committee recommend that the *Australian Human Rights Commission Legislation Bill 2003* be amended to clarify the status under Commonwealth law of guidelines to be developed by the Commission pursuant to its information dissemination and education roles.

4.2.3 We recommend that the Senate Legal and Constitutional Legislation Committee recommend that the *Australian Human Rights Commission Legislation Bill 2003* be amended to provide that the President's discretion to intervene in Court proceedings is to be exercised entirely independently of the Attorney General, and the government of the day.

4.2.4 We recommend that the Senate Legal and Constitutional Legislation Committee recommend that the *Australian Human Rights Commission Legislation Bill 2003* is amended to provide the proposed role of Complaint Commissioner with secure tenure consistent with the *Paris Principles*.

4.2.5 We recommend that the Senate Legal and Constitutional Legislation Committee recommend that the *Australian Human Rights Commission Legislation Bill 2003* be amended to include provisions enabling the appointment of advisory committees to the Commission.