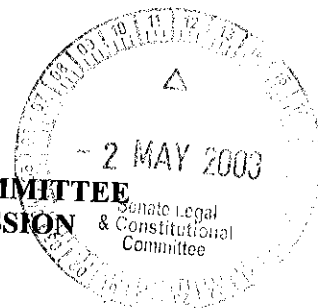


**SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
INQUIRY INTO THE AUSTRALIAN HUMAN RIGHTS COMMISSION
LEGISLATION BILL 2003**



SUBMISSION OF THE VICTORIAN BAR

The Victorian Bar is opposed to the substantial amendments proposed.

The Victorian Bar is opposed to the substantial amendments proposed in the Australian Human Rights Commission Legislation Bill 2003.

Significant amendments contained in the Bill

1. The Bill contains the following significant amendments upon which the Victorian Bar wishes to comment:

- a) The removal of the Commission's independent decision making function in relation to intervention in judicial proceedings involving human rights issues and its replacement with the requirement that the Attorney-General approve such intervention (save in one circumstance)¹.
- b) The replacement of the current "special purpose" Human Rights Commissioners with three "general" Commissioners².
- c) The imposition of a legislative requirement on the Commission to adopt, use and encourage the use of a "by line" – "human rights –everyone's responsibility"³.
- d) The removal of the Commission's ability to recommend the payment of monetary compensation where the Commission finds there has been a human rights breach or discrimination in employment⁴.

Support for other submissions

2. The Victorian Bar supports the submissions to the Committee made by the Human Rights and Equal Opportunity Commission, including the opening statements made to the Committee at its 29 April 2003 hearing in Sydney by Professor Alice Tay (President of the Commission) and Dr William Jonas (the Aboriginal and Torres Strait Islander Social Justice Commissioner), copies of which are posted on

¹ See s 26 of the Bill, inserting s 11(5) into the Act.

² See ss 7 and 8 of the Bill, amending s 3 of the Act.

³ See s 25 of the Bill, inserting s 11(1A) into the Act.

⁴ See s 35 of the Bill, substituting s 29(2)(c) of the Act.

the HREOC website. The HREOC submissions are, in the opinion of the Victorian Bar, well researched and sound, and they provide the most informed position on the functions and administration of HREOC under the current legislative regime. Given HREOC's present high level of independence and reputation, its submissions as to the appropriateness and effectiveness of the present legislative framework ought to be given substantial weight. The Attorney General's Explanatory Memorandum and Second Reading Speech explain the provisions of the Bill. They do not, the Victorian Bar submits, explain the necessity or justification for such changes. The onus is on the Government to provide detailed and concrete information, which it has not done.

3. The Victorian Bar also supports the submissions made by the Law Institute of Victoria and by Liberty Victoria.

Specific position of the Victorian Bar on each of the four key amendments

Removal of independent decision making about intervention

4. This is the matter of most concern to the Victorian Bar.
5. The proposed amendment places the Attorney-General in a clear conflict of interest (whether actual or perceived does not matter), since most of the Commission's proposed interventions are likely to be in cases where the Commonwealth is a party and where the Commonwealth's position in the litigation is not supported by the Commission's submissions⁵.
6. The incumbent Attorney-General has made it quite clear, in respect of assertions that he has failed to discharge the responsibility of his office to defend the judiciary, that Commonwealth Attorneys-General are "politicians and members of a Government, with the usual responsibilities and constraints that this entails", who "are not, and cannot be, independent of political imperatives"⁶.
7. The independence of the Commission is severely compromised by the amendment. It should remain a core part of the Commission's functions to determine for itself when, and in what way, respect for and recognition of human

⁵ That this is likely to be the case is borne out by the material in HREOC's submissions at Part 2.2

⁶ See Daryl Williams, "The Role of an Australian Attorney-General: Antipodean Developments from British Foundations, Speech given on 9 May 2002 at paragraphs 85 and 86. See also his speech at the Judicial Conference of Australia Colloquium 2001, 7 April 2001 at paragraphs 28-30.

rights in Australia will be advanced by the placing of particular submissions before a Court in particular proceedings.

8. The proposed amendment cuts across the role of the courts in controlling intervention in judicial proceedings. Since intervention in the case of bodies such as HREOC is by leave and is principally for the purpose of assisting the court, courts' decisions on the circumstances in which leave to intervene will be granted and the terms on which it shall be granted should be given full operation. The requirement for leave, together with the decision making process described by HREOC in its submissions to the Committee, constitute a sufficient filter to ensure that interventions do not become a burden on the courts or consume too much of the Commission's activities. The potential costs consequences flowing from intervener status provide an additional incentive for the intervention function to be carefully exercised. There is no objective evidence whatsoever that HREOC has intervened inappropriately in judicial proceedings, notwithstanding that some of its interventions may have been inconvenient for the Government, or resulted in submissions being put that were contrary to the Government's preferred position.
9. The Victorian Bar also adopts that part of HREOC's submissions which deals with the inappropriateness of s 11(6) and the dichotomy to be established between a President who is a Federal Judge and one who is not.
10. The expressed reason for the amendment – "to prevent duplication and the waste of resources and to ensure that court submissions accord with the interests of the community as a whole"⁷ – highlights the problems with this proposal. There is generally no "duplication" in an intervention because leave will not be granted if an intervener will say no more than the parties will say. There is no "waste of resources" because HREOC places material before the courts about human rights and international law that the parties' resources and expertise either cannot or do not reach. The word "waste" is value laden, and seems to reflect the Government's view that HREOC should not be permitted to make arguments which contradict the Government's legal position.
11. Finally, if what is meant by requiring HREOC only to make submissions which "accord with the interests of the community as a whole" is requiring it to make

⁷ Second Reading Speech, *Hansard*, House of Representatives, 27 March 2003, 13434.

only those submissions the Government believes (rightly or wrongly) are acceptable to a majority of Australians, then this asks HREOC to behave contrary to the very principles underlying all the international instruments upon which its existence is premised. Human rights, and human rights law, traditionally protects the weak and the vulnerable, individuals and groups who are frequently if not always in a minority or without a voice. Their causes may be considered by many Australians as unpopular⁸, considered “immoral”⁹ or as constituting some kind of threat to the Australian nation¹⁰. Applying some kind of “popularity” filter to decisions on intervention fundamentally injures the objective application of human rights law and practices in Australia.

The replacement of special purpose Commissioners

12. The Victorian Bar endorses HREOC’s submissions on this issue¹¹, and most importantly endorses the comments of Dr Jonas in his statement to the Committee concerning the special position of the Aboriginal and Torres Strait islander Social Justice Commissioner. In circumstances where this Government continues to assert a commitment to reconciliation with indigenous people in this country, and a commitment to recognition of indigenous culture and values, it is hypocritical to maintain those assertions while abolishing a key Commonwealth public appointment dedicated to the interests of indigenous Australians. As Dr Jonas points out, it is important that there be a continued and dedicated position to monitor and report upon the human rights situation of indigenous people.

Legislative imposition of a by line

13. The Victorian Bar notes the corrections made by HREOC in its submission¹² to the sweeping statement in the Second Reading Speech that the by line was “suggested” by HREOC.
14. The concern over the by line is that, once again, it weakens the independence of HREOC. It should be a matter for the Commission to determine itself the most appropriate way to convey its messages about the importance of human rights. It is an inappropriate dictation by Government.

⁸ For example, the IVF case.

⁹ For example, the right of transsexual people to marry.

¹⁰ For example, the Tampa case.

¹¹ See HREOC submissions at 3.5.

¹² See 4.5.

Removal of the power to recommend compensation.

15. There is no explanation in the Second Reading Speech for this amendment. In the Explanatory Memorandum¹³ the rationale advanced is that HREOC's current recommendations in cases where it identifies an act or practice which constitutes discrimination "cannot be pursued in any way": that is, cannot be pursued in subsequent judicial proceedings, unlike findings under the Disability Discrimination Act, the Racial Discrimination Act and the Sex Discrimination Act.
16. The Victorian Bar supports the submission of HREOC¹⁴ that the power to make recommendations for compensation is both appropriate and effective – witness the fact that in a significant percentage of cases the recommendations are complied with.

Conclusion

17. The Victorian Bar is of the view that this legislation is unnecessary. More importantly, it undermines the very strong and valuable role of HREOC in the administration of justice and the protection and enhancement of human rights in Australia.

2 May 2003

¹³ See Item 42.

¹⁴ See 4.1.

Clifford, Julia (SEN)

From: Ross Nankivell [legal@vicbar.com.au]
Sent: Friday, 2 May 2003 1:44 PM
To: Legal and Constitutional, Committee (SEN)
Subject: Australian Human Rights Commission Legislation Bill 2003

Ms. Louise Gell
Acting Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Ms. Gell,

On behalf of Mr. John T. Rush RFD, QC, Chairman of the Victorian Bar Council, I attach the Submission of the Victorian Bar in relation to the Australian Human Rights Commission Legislation Bill 2003.

The Victorian Bar joins the Law Institute of Victoria and Liberty Victoria in requesting that the Committee hold a public hearing in Melbourne so that it may make oral submissions and have the opportunity to respond to any questions the Committee may have.

Yours truly,

Ross Nankivell

Ross Nankivell Phone + 61 3 9225-8775 (office)
Legal Policy Officer + 61 3 9670-2959 (fax)
The Victorian Bar 0412 048 172 (mobile)
Owen Dixon Chambers Email: legal@vicbar.com.au
205 William Street
Melbourne Vic 3000
AUSTRALIA