



Law Council
OF AUSTRALIA

**SUBMISSION
TO THE
SENATE LEGAL AND CONSTITUTIONAL
LEGISLATION COMMITTEE**

**Provisions of the Australian Human
Rights Commission Legislation Bill 2003**

5 May 2003

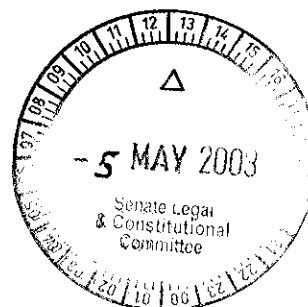


Law Council
OF AUSTRALIA

MHL.MAN.JGW.LCA1398

5 May 2003

Ms Louise Gell
A/g Secretary
Senate Legal and Constitutional
Legislation Committee
Parliament House
Canberra ACT 2600



Dear Ms Gell

**Provisions of the Australian Human Rights Commission
Legislation Bill 2003**

I refer to your letter of 9 April 2003 inviting the Law Council to make a submission in relation to the provisions of the above Bill, and the letter of the Law Council's Ms Margery Nicoll to you of 24 April 2003, confirming the Law Council would be making a submission. Please find the Law Council's submission **attached**.

The Law Council is grateful for the extension of time granted in which to make a submission.

On forwarding this submission to you, the Law Council will circulate a copy amongst its committees and member organisations. However, no public disclosure will be made until advice is received that the Senate Legal and Constitutional Legislation Committee (the "Committee") has provided approval.

The Law Council wishes to assist the Committee in its deliberations, and would appreciate the opportunity to appear at a possible hearing on 12 May 2003. The contact officer in the Law Council Secretariat for this matter is Mr James Greentree-White.

Yours sincerely


Michael Lavarch
Secretary-General

[h:/james/human rights/australian human rights commission senate submission covering letter](http://james/human%20rights/australian%20human%20rights%20commission%20senate%20submission%20covering%20letter)

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**SUBMISSION
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**PROVISIONS OF THE AUSTRALIAN HUMAN
RIGHTS COMMISSION LEGISLATION BILL 2003**

Summary

1. In relation to the Australian Human Rights Commission Legislation Bill 2003, the Law Council:
 - rejects the proposed executive structure for the Australian Human Rights Commission¹ of a President and three Human Rights Commissioners,
 - rejects the proposed restriction on the Commission's intervention in court matters; and
 - rejects limiting the Commission's powers concerning infringements of a human right.

¹ The "Australian Human Rights Commission" is the new name proposed by the Australian Human Rights Commission Legislation Bill 2003 for the present Human Rights and Equal Opportunity Commission. This submission uses the term "Commission" for convenience, to refer to the Australian Human Rights Commission or the Human Rights and Equal Opportunity Commission as the case may be.

The Law Council of Australia

2. The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 36,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).
3. The constituent bodies of the Law Council are, in alphabetical order:
 - ACT Bar Association;
 - Bar Association of Queensland;
 - Law Institute of Victoria;
 - Law Society of the ACT;
 - Law Society of NSW;
 - Law Society of the Northern Territory;
 - Law Society of South Australia;
 - Law Society of Tasmania;
 - Law Society of Western Australia;
 - New South Wales Bar Association;
 - Queensland Law Society; and
 - the Victorian Bar.
4. The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.
5. The Law Council notes that in relation to this inquiry, the following constituent bodies are making their own submissions: Law Institute of Victoria, Law Society of NSW, NSW Bar Association, and the Victorian Bar.

Background

6. The provisions of the Bill have been referred to the Senate Legal and Constitutional Legislation Committee (the "Senate Committee"). The Law Council has been invited to make a submission on the provisions of the Bill.
7. In the second reading speech to the Australian Human Rights Commission Legislation Bill (the "Bill"), the Attorney-General, the Hon Daryl Williams, said: "The Bill implements the government's 2001 election commitment to reform the [Human Rights and Equal Opportunity] commission 'to ensure that it is efficient and focused on educating the broader Australian community about human rights issues'."²
8. The Attorney also said that: "The Bill is the result of a detailed examination by the government of the structure of the commission and of a reconsideration of the responses to past efforts at reform."³ The Bill has similarities with the earlier Human Rights Legislation Amendment Bill (No 2) 1998. The Law Council made a submission in July 1998 to the Senate Committee in relation to that earlier Bill, and where relevant this submission draws upon that earlier submission.
9. This submission is directed to three issues:
 - the proposed new executive structure,
 - restricting the Commission's intervention in court matters; and
 - limiting the Commission's powers concerning infringements of a human right.

² House of Representatives *Hansard*, 27 March 2003, at 13766.

³ *Ibid.*

The proposed new executive structure

10. The Bill creates an executive structure of a President and three Human Rights Commissioners,⁴ replacing the present structure of a President and specialist Commissioners.
11. The Law Council believes that there is symbolic importance and visibility with specialist commissioners. The recent attention which has been generated for the issue of paid maternity leave by the Sex Discrimination Commissioner is a good example of the advocacy role that can be played by specialist commissioners. The Law Council is concerned that this kind of focus may be less possible under a generalist structure.
12. The Law Council is particularly concerned about the loss of a specifically identified Aboriginal and Torres Strait Islander Social Justice Commissioner. Presently, in relation to that position, the legislation has a requirement concerning experience of Indigenous community life.⁵ The Law Council is concerned that this focus may be lost in the move to generalist positions, where that requirement will not apply.
13. In relation to human rights issues which raise more than one subject matter (for example, both race and sex discrimination), the Law Council accepts the position put by the Commission that the "current structure does not prevent the Commission from dealing with topics that raise broad or intersecting human rights issues in a flexible and informed manner".⁶

⁴ Schedule 1, item 13.

⁵ Sub-section 46B(2) of the *Human Rights and Equal Opportunity Commission Act 1986* provides that: "A person is not qualified to be appointed unless the Governor-General is satisfied that the person has significant experience in community life of Aboriginal persons or Torres Strait Islanders".

⁶ *Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Legislation Committee on the Australian Human Rights Commission Legislation Bill 2003* at paragraph 3.5(c). That submission refers to examples of Commission reports that deal with intersecting issues.

14. The Law Council considers that specialist commissioner positions should be retained, so as to provide visibility to particular issues of discrimination. Accordingly, the Law Council is opposed to the proposed executive structure of a President and three Human Rights Commissioners.
15. An issue that will arise, with the retention of specialist commissioners, is how to cater for issues which may be seen as sufficiently distinct to warrant a commissioner position, for example age discrimination. It is probably the case that, over time, additional commissioner positions will need to be created if (as the Law Council considers) specialist positions are to be retained.
16. There is no particular reason that commends itself to the Law Council why the Commission's legislation should set three as the number of commissioners. Although there presently are three persons occupying commissioner positions, this could increase to four or five if certain positions were filled on a full-time basis. And, as noted above, over time it may be appropriate to amend the legislation to create additional commissioner positions.
17. In the event that the Parliament endorses the proposed new executive structure, the Law Council notes that, unlike the Human Rights Legislation Amendment Bill (No 2) 1998, the Bill contains transitional provisions allowing the present specialist commissioners to continue to serve out their term as Human Rights Commissioners under the new structure.⁷ The Law Council supports this development, and recognises the government's positive response to criticism of the earlier Bill on this issue.

⁷

Schedule 1, item 146.

Restriction on Commission intervention in court matters

18. The Bill proposes to require the Attorney-General's approval before the Commission can seek leave of a court to intervene in a matter,⁸ unless the President of the Commission is, or was immediately before becoming President, a federal judge, in which case the Commission must notify the Attorney-General prior to intervening. Such a notification must be made together with a statement as to why the Commission considers it appropriate to intervene, and must be made "at a time when there is still a reasonable period before the Commission seeks leave to intervene".⁹
19. The Law Council is completely opposed to the restriction on intervention made by the proposed approval process, and is also concerned about the proposed notification process.
20. The Commission has had the function of intervening in court proceedings since the commencement in 1986 of the *Human Rights and Equal Opportunity Commission Act 1986*. In that time, the Commission has intervened in approximately 35 cases before courts and tribunals, and it has never been refused leave.¹⁰
21. The proposed approval process completely compromises the independence of the Commission. The Law Council agrees with the Commission that "such a proposal is at odds with the Commission role as an independent body, responsible for monitoring and promoting Australia's compliance with its human rights obligations".¹¹ The current intervention power enables the Commission to have an impact on the

⁸ Schedule 1, item 93 (in relation to the renamed *Human Rights and Equal Opportunity Commission Act 1986* – the Bill proposes that it be renamed the *Australian Human Rights Commission Act 1986*, see Schedule 1, item 1); item 121 (in relation to the *Racial Discrimination Act 1975*); and item 138 (in relation to the *Sex Discrimination Act 1984*).

⁹ See *ibid.*

¹⁰ Human Rights and Equal Opportunity Commission, Media Release, 27 March 2003.

¹¹ *Ibid.*

development of human rights law in Australia. This role should not be captive to the government of the day.

22. Furthermore, the approval process basically duplicates an existing court process, whereby the court has discretion as to whether a party can intervene in a matter. Accordingly, the amendment can also be seen as a limitation on judicial independence, as it would give the Attorney-General the power to pre-empt the court's decision on whether the Commission would be given leave to intervene in a matter.
23. In its consideration of the Human Rights Legislation Amendment Bill (No 2) 1998, the Senate Committee considered a similar proposal for Attorney-General approval of Commission interventions. The Senate Committee's conclusions in its report on the earlier Bill are worth recalling at length:

"2.20 The committee considers that the issue is the balance between two potentially conflicting principles. The first principle is that the executive government has a legitimate prerogative to set policy and determine the role of government agencies, and to ensure that the powers of an agency are used "in the best interests of the Australian community as a whole". [footnote omitted]

2.21 The second principle is that Australia's peak human rights organisation should be independent from executive government.

2.22 In considering whether changes are needed to the current balance between these two principles, the committee has not received any evidence that the commission's power to intervene has been abused. In fact, the commission has never been refused leave to intervene by the courts on the limited occasions in which it has sought such leave [footnote omitted], and indeed

the committee received evidence that the courts value contributions made by HREOC [that is, the Human Rights and Equal Opportunity Commission].

2.23 The changes proposed may well give rise to conflicts of interest for the Attorney-General, and be perceived by the community as compromising the independence of the commission. At the same time the proposed changes impose an additional level of administrative procedures to be observed. The committee is also concerned that the proposed legislation contains no accountability or review provisions to make the decision-making process transparent, predictable and reviewable.

Recommendation No. 2:

*The committee therefore **recommends** [emphasis in original] that the 1998 bill be amended to restore the status quo, so that the commission's intervention power remains free of the need for approval by the Attorney-General. The committee considers that potential difficulties may be avoided by more effective communication systems between the commission and the Attorney-General.¹²*

24. The Law Council agrees with the above recommendation, and believes that nothing has changed since 1998 that would warrant the Senate Committee coming to a different conclusion on the Bill now before it.
25. Although less offensive than the proposed approval process, the proposed notification process is also concerning. The Explanatory Memorandum to the Bill states at paragraph 76 that the notification process "when the President is, or was immediately before

appointment as President, a federal Judge ensures that there are no constitutional issues arising from the appointment of a federal Judge as President". The Explanatory Memorandum does not elucidate what are the possible constitutional issues, but presumably it is the infringement on the independence of the President that would be made by the approval process.

26. The notification process would appear to increase the ability of the government of the day to influence the Commission in its intervention decisions. This impression is strengthened by the Explanatory Memorandum to the Bill at paragraph 76, which rather unfortunately refers to the "requirement for the new Commission to notify the Attorney-General of its intention to seek leave to intervene in court proceedings and its reasons for doing so, but not requiring the Attorney-General's *formal* [emphasis added] approval of this function".
27. In principle, there is nothing to object in the Commission informing the Attorney-General of its intervention decisions, and its reasons for doing so. The problem is in the apprehension (whether correct or not) that the mechanism is designed to allow the Attorney-General "informal approval" of interventions. The Law Council's preferred option is for neither the approval nor notification processes to be adopted, and the *status quo* remain.
28. However, if there is to be change, then a legislated notification process (to apply whether or not the President was, or immediately had been, a federal judge) might be acceptable. However, in the first instance, the Law Council believes that the Senate Committee's suggestion in its recommendation quoted above, of "more effective communication systems between the commission and the Attorney-General", be attempted without recourse to legislation.

¹²

Senate Legal and Constitutional Legislation Committee, *Provisions of the Human Rights Legislation Amendment Bill (No 2) 1998*, paragraphs 2.21-2.23 and

Limiting the Commission's powers concerning infringements of a human right

29. The Bill proposes to remove the Commission's powers to recommend payment of compensation for a particular human rights transgression under the renamed *Human Rights and Equal Opportunity Commission Act 1986*.¹³ As was said about essentially the same proposal in the Human Rights Legislation Amendment Bill 1998 (No 2), the Law Council deplores this. The Law Council's view is that the effectiveness of the Commission depends in part upon such powers.

Recommendations

30. The Law Council recommends that the Senate Legal and Constitutional Legislation Committee:
- Reject the proposed executive structure of a President and three Human Rights Commissioners.
 - Reject the proposed restriction on the Commission's intervention in court matters.
 - Preferably also reject the proposed notification process. Although a legislated notification process might be acceptable, in the first instance, the Law Council believes more effective communication systems between the Commission and the Attorney-General should be attempted without recourse to legislation.
 - Reject limiting the Commission's powers concerning infringements of a human right.

5 May 2003