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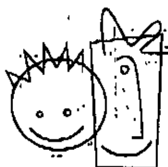

nsw commission for
children & young people

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

Dear Ms Gell

Thank you for your letter of 9 April 2003 inviting me to make a submission to the Legal and Constitutional Legislation Committee's inquiry into the Australian Human Rights Commission Legislation Bill 2003.

I am pleased to enclose my submission. The Commission for Children and Young People has a statutory responsibility to promote the safety, welfare and well-being of children and young people in NSW. One way in which the Commission discharges this responsibility is to comment on legislation affecting children and young people under 18 years of age in NSW.

If you have any questions regarding this submission, please contact Rachel White, the Commission's legal officer, on 9286 7206 or by rachel.white@kids.nsw.gov.au.

Yours sincerely

Gillian Calvert

Gillian Calvert
Commissioner
22 April 2003

Level 2, 407 Elizabeth Street Surry Hills NSW 2010
ABN: 89 554 425 302
Tel: 02 9286 7276 Fax: 02 9286 7267
WWCC Fax: 02 9286 7201 TTY: 02 9286 7286
Email: kids@kids.nsw.gov.au
Web: www.kids.nsw.gov.au

SUBMISSION BY THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE

TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE ON THE

AUSTRALIAN HUMAN RIGHTS COMMISSION LEGISLATION BILL 2003

April 2003

NSW Commission for Children and Young People
Level 2, 407 Elizabeth Street
Surry Hills NSW 2010
Contact: Rachel White, Legal Officer
Phone: (02) 9286 7266
Fax: (02) 9286 7267
Email: kids@kids.nsw.gov.au

SUBMISSION BY THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE TO THE SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE ON THE AUSTRALIAN HUMAN RIGHTS COMMISSION LEGISLATION BILL 2003

1. The Commission for Children and Young People

1.1 The NSW Commission for Children and Young People ('Commission') was established by the *Commission for Children and Young People Act 1998* ('Act'). The Act lays down three statutory principles which govern the work of the Commission:

(a) the safety, welfare and wellbeing of children are the paramount considerations;

(b) the views of children are to be given serious consideration and taken into account; and

(c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children: *s10.*

1.2 The Commission is required to give priority to the interests and needs of vulnerable children: Act, section 12.

1.3 Children are defined in the Act as all people under the age of 18 years. The terms 'child' and 'children' will be used in this submission to refer to children and young people under the age of 18 years.

1.4 It is one of the principal functions of the Commission to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children: Act, section 11(d).

2. This submission

2.1 The Commissioner thanks the Senate Legal and Constitutional Legislation Committee for its invitation to make a submission as part of its inquiry into the Australian Human Rights Commission Legislation Bill 2003 ('Bill').

2.2 In summary, the Bill seeks to amend the legislation governing the functions, powers and organisational structure of the Human Rights and Equal Opportunity Commission ('HREOC') and rename HREOC as the Australian Human Rights Commission.

3. General comments

3.1 This submission focuses on three aspects of the Bill which are of concern to the Commission as an institutional advocate for children in NSW:

(a) The requirement that the Attorney-General approve the Australian Human Rights Commission seeking leave to intervene in court proceedings raising human rights issues or discrimination issues;
(b) The removal of the power to recommend the payment of compensation; and
(c) The restructure of the Commission, with the standardisation of the qualifications and experience required of Commissioners.

3.2 The Commission's view is that these proposals, if implemented, will diminish the capacity of the Australian Human Rights Commission to protect and promote children's rights in Australia. In particular, the proposals will erode the Australian Human Rights Commission's independence and unnecessarily restrict the means available to it to perform its vital role for Australia's children.

4. The Attorney-General approval's of the Australian Human Rights Commission's intervenor power

4.1 The HREOC currently has the function of intervening, with the leave of the court, in proceedings that involve human rights or discrimination issues, pursuant to the *Human Rights and Equal Opportunity Commission Act 1986* ('HREOC Act'), the *Racial Discrimination Act 1975* ('RDA'), the *Sex Discrimination Act 1984* ('SDA') and the *Disability Discrimination Act 1992* ('DDA'). As an intervenor, HREOC is able to advocate for or defend a particular legal position or a particular interpretation of any legislation at issue in the proceedings.

4.2 The Bill, if passed, would require the Australian Human Rights Commission to obtain the Attorney-General's approval before exercising its power to seek leave to intervene. The only exception, for constitutional reasons, is if the President of the new Commission is, and was immediately before appointment, a federal Judge. In that case, the Australian Human Rights Commission is required under the Bill to notify the Attorney-General of any proposed intervention.

4.3 The Bill sets out a range of matters that the Attorney-General may have regard to in deciding whether to approve the Australian Human Rights Commission seeking to exercise its intervenor power. These matters are:

- whether there has been an intervention in the proceedings by or on behalf of the Commonwealth;
- whether the proceedings may affect, or involve, human rights or discrimination issues to a significant extent;
- whether the proceedings have significant implications for the HREOC Act, the DDA, the RDA or the SDA; and
- whether there are special circumstances such that it would be in the public interests for the new Commission to intervene.

However, the Attorney-General may have regard to none or only some of these matters, and may consider other matters to be relevant to his decision.

4.4 The rationale given in the Explanatory Memorandum to the Bill for restricting the Commission's power is that it "will ensure that the intervention function is only exercised after the broader interests of the community have been taken into account" (paragraph 37). In his Second Reading Speech, the Attorney-General noted that:

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"this 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" (Hansard, 27 March 2003, p.13433).

4.5 The Commission is not aware of any evidence to support the view that the intervention power is not being exercised in the public interest. In thirty-five interventions sought to date, leave has been granted in every case. This suggests that the HREOC's judgement as to when it should exercise its power corresponds to judicial judgements as to when it has a legitimate interest in court proceedings, justifying intervention.

4.6 In the area of children's rights, HREOC has made some very important interventions, contributing its expertise and putting arguments before courts that may not otherwise have been presented. The HREOC's submissions have guided courts in matters, such as:

- the role of the Immigration Minister as the guardian of unaccompanied minors who have sought asylum (*Simon Odhiambo and Peter Martizi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1092);
- the sterilisation of girls and young women with intellectual disabilities (e.g. *J.W.B v S.M.B.* (1992) 175 CLR 218 ('Marion's case'));
- the consent required for a child to receive surgical treatment (*Re Michael: John Briton, Acting Public Advocate (Victoria) v GP & KP* (1994) FLC 92-486);
- the application of the law when a child is abducted from Australia (*ZP v PS* (1994) 68 ALJR 554); and
- the best interests of a child in relation to the deportation of a parent (*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273).

4.7 In any event, the proposed approval requirement is significantly flawed because it compromises the independence of the Commission, for no apparent benefit to the community. It permits the Attorney General to be the 'gatekeeper' of the intervenor power, even in cases where the Commonwealth Government is a party to the litigation or where, as another intervenor, it might oppose the Commission's submission. This gives rise to a potential conflict of interest. It also leaves unanswered how broader community interests will be taken into account. The Attorney-General is free to consider whatever matters he/she thinks relevant in determining whether to approve an intervenor proposal, without any explicit consultation requirement. Moreover, there is no obvious avenue of review or accountability mechanism open to a person or body who may wish to scrutinise the Attorney-General's decision.

4.8 The argument that this restriction on the intervenor power avoids duplication of resources is also a curious one. Resource duplication only becomes an issue in those instances where the Commonwealth and the Australian Human Rights Commission present an identical legal position in court proceedings. However, it would be unusual for intervening parties to have the same view of Australia's human rights commitments, and this has not been so in previous cases in which both the Commonwealth and HREOC have been parties.

4.9 Finally, there are alternative means – other than restricting the intervenor power of the Australian Human Rights Commission – available to the Commonwealth Government to address its concerns. The HREOC suggested a number of alternatives in its submission to the Committee's earlier inquiry into the Human Rights Legislation Amendment Bill (No. 2) 1998, a Bill that included a similar restriction on HREOC's intervenor power. In its submission, the HREOC suggested that if the Attorney-General wished to ensure that interventions occur in the public interest, the HREOC could be legislatively required to consider particular criteria in relation to the exercise of its power (available at www.humanrights.gov.au/legal/submissions/hrla98.html, paragraph 3.7(b). Furthermore, the HREOC suggested that, to avoid duplication of resources:

> "a more appropriate response to any perceived difficulty is the development of a written protocol between the Attorney-General and the Commission in relation to the consideration of possible interventions by the Commission so that the Commission and the Commonwealth may co-operate in relation to interventions" (paragraph 3.7(c)).

Alternatively, the Bill could require the Australian Human Rights Commission to advise the Attorney-General, and seek comment, on any proposed intervention. However, it would be important that the Commission retains its independence to decide when it will seek leave to intervene.

5. The removal of the power to recommend the payment of compensation

5.1 The HREOC currently has the power to recommend the payment of compensation or damages to remedy loss suffered by a complainant as a result of an act or practice which is found to be inconsistent with, or contrary to, the complainant's rights: HREOC Act, subsections 29(2)(c) and 35(2)(c).

5.2 The Bill proposes to remove this power to recommend the payment of compensation. The Explanatory Memorandum indicates that:

> "these recommendations cannot currently be pursued in any way because, unlike in the case of discrimination under the DDA, the RDA and the SDA, the acts or practices to which these recommendations relate are not made unlawful under the HREOC Act" (paragraph 51).

5.3 If it is a technical obstacle to the HREOC recommending recompense that acts or practices that are inconsistent with, or contrary to, human rights are not unlawful under the HREOC Act, then the Bill provides an opportunity to make the necessary amendments. If the Australian Human Rights Commission is to be a credible body in relation to the enforcement of human rights (including children's rights), it should have broad means available to it to signal the seriousness of any act or practice that breaches those rights. As the HREOC noted in its 1998 submission to the Committee in relation to the Human Rights Legislation Amendment Bill (No. 2) 1998:

> "A finding by the Commission...can relate to a significant violation of human rights or act of discrimination or to a minor one. The only way to distinguish between the degrees of seriousness of the violation is for the recommendation to reflect it. The removal of the power to make recommendations as to compensation denies the Commission the power to make these distinctions" (para. 5.4.1).

6. The proposed restructure of the Commission

6.1 The HREOC currently comprises a President and three Commissioners, performing specialist roles in the areas of human rights, Aboriginal and Torres Strait Islander social justice, race discrimination, sex discrimination and disability discrimination.

6.2 The Bill proposes to restructure the HREOC as the Australian Human Rights Commission by creating the positions of President and three generalist Human Rights Commissioners. The restructure does not change the substantive functions which the specialist commissioners currently exercise, but confers these functions on the Commission. The Human Rights Commissioners will not have specific functions allocated to them but will be charged with holding responsibility, as a group, for all functions of the new Commission. The allocation of specific responsibilities will be at the discretion of the President.

6.3 The Explanatory Memorandum to the Bill notes that this restructure is designed to give the Australian Human Rights Commission "greater flexibility to deal with current human rights issues which cut across the boundaries of the existing specialisations" (Outline, p.1). In his Second Reading Speech, the Attorney-General clarified that the Australian Human Rights Commission will retain responsibility for determining its administrative support structure (Hansard, 27 March 2003, p.13433).

6.4 The restructure may usefully reflect human rights and anti-discrimination intersections. It may also give the Australian Human Rights Commission the flexibility it needs to respond to evolving priorities and emerging areas, such as age discrimination. However, it will be important that the Australian Human Rights Commission is still able to access specialist expertise, including children's rights expertise. Without such expertise, it will be difficult for the Commission to make choices as to the priority issues that it pursues within a generalist operational framework. It may be useful for the Australian Human Rights Commission to be required to account, through the annual reporting process, for such choices.

6.5 This proposal for a more generalised structure should not neglect the likely human rights challenges to be faced by the Australian Human Rights Commission. For this reason, the Commission supports the retention of the requirement that one or more of the commissioners have "significant experience in the community life of Aboriginal persons or Torres Strait Islanders". Currently, section 46B of the HREOC Act requires the Aboriginal and Torres Strait Islander Social Justice Commissioner to have such experience. The Bill removes this requirement and does not replicate it as a criterion to be satisfied by the President or any of the generalist Human Rights Commissioners. In effect, this means that it would be unnecessary for any Commission members to have such experience, even though it is probable that race discrimination and Indigenous social justice will remain priority issues.

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