Sex And Gender Education (SAGE)

PO BOX 879, Randwick, NSW 2031
Ph 0421 479 285
E-mail contact-sage@sage-australia.org
Website www.sage-australia.org

23 April 2003

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

Submission to the Committee's inquiry into the Australian Human Rights Commission Legislation Bill 2003

Thank you for the opportunity to provide a submission to the above inquiry. We are an organisation which both educates about and campaigns for the rights of sex and gender diverse people. As such, we have a strong interest in human rights.

The attached submission is intended to be constructive and to help ensure that the Human Rights and Equal Opportunity Commission is able to continue to carry out all of its important functions.

This submission has been authorised by the SAGE Steering Committee.

We are willing to discuss further any matters in this submission.

Yours Sincerely

norrie mAy welby
(SAGE Spokesperson)

Tracie O'Keefe
(Steering Committee Member)

Peta Bourne
(Steering Committee Member)

Sex and Gender Education (SAGE) Submission to the Inquiry into the Australian Human Rights Commission Legislation Bill 2003

April 2003

In his Second Reading Speech on 27 March 2003, the Attorney-General stated: "The government believes that education is the key to a society in which human rights are respected by all."

SAGE welcomes the Attorney-General's acknowledgement of the important role to be played by education and the dissemination of information in overcoming discrimination. We are, however, concerned that other important functions of the Commission would be weakened if the *Australian Human Rights Commission Legislation Bill 2003* were to be enacted in its present form.

Our specific concerns are:

- The requirement that the Commission seeks leave from the Federal Attorney-General to intervene in cases before the court;
- The removal of specialised portfolio Commissioners in favour of a more generic approach: and
- The loss of the Commission's ability to recommend compensation under the HREOC Act.

The requirement that the commission seeks leave from the Federal Attorney-General to intervene in cases before the court

The following information on the Commission's intervention role is found on the Commission's website (http://www.hreoc.gov.au/legal/intervention_info.html)

"The Commission has the power to intervene, with leave of the Court, in proceedings that involve issues of race, sex and disability discrimination, human rights issues and equal opportunity in employment. The power to seek leave to intervene is contained in:

- The *Racial Discrimination Act 1975* (Cth), s 20(1)(e)
- The *Sex Discrimination Act 1984* (Cth), s 48(1)(gb)
- The *Disability Discrimination Act 1992* (Cth), s 67(1)(l)
- The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(o) and s. 31(j)

"When a relevant human rights or discrimination issue arises in a case and the Commission could provide expert assistance that would otherwise not be available to the Court, the Commission may seek leave of the Court to intervene in the proceedings. The Commission will then make submissions on the issues that relate to the Commission's powers."

The Commission's website contains a table which lists those cases where HREOC has intervened since 1988:
(http://www.hreoc.gov.au/legal/guidelines/table_interventions.doc)

For convenience, that table is reproduced at Appendix A. As can been seen from the table, the government of the day has often been a party to litigation where the Commission has seen the need to intervene. Of special interest to SAGE was case of *the Attorney-General for the Commonwealth v Kevin and Jennifer.*

Under the proposed changes, the Commission could only seek leave from the court if the Attorney-General agrees.

The marginalised nature of many of the cases the Commission has intervened in, ranging from the rights of transgender people to marry, to an inquest into the death of "unlawful non-citizens at sea", makes it clear that the Commission's ability to intervene without the fear or favour of the government is essential to the provision of justice for all, even the disenfranchised and politically unpopular. The proposal to require the Commission to get approval from the Attorney General before seeking a court's leave to intervene in cases is an unwelcome erosion of the separation of the parliamentary and judicial arms of government, that would leave those most vulnerable in society to face injustice unsupported.

We believe that this is a serious attack on the independence of the Commission and represents a conflict of interest.

The removal of specialised portfolio Commissioners in favour of a more generic approach

The Attorney-General has acknowledged (in his Second Reading Speech on 27 March 2003) that there is a possibility of new areas of commission responsibility such as age discrimination. We would hope that in future there may also be a commission responsibility for Sexuality and Sex & Gender Diversity discrimination.

We believe that additional areas of responsibility ought to have specialised commissioners to ensure that the required expertise will be available. To expect that the President and three commissioners would be able to provide expertise, knowledge and experience for all such future possible areas of responsibility is, in our opinion, misguided.

The loss of the Commission's ability to recommend compensation under the HREOC Act

We believe that an important educational role is fulfilled through the commission's power to recommend compensation in cases of human rights abuses. Such recommendations provide an insight of the Commission's view of the degree of seriousness of breaches of human rights.

Conclusion

SAGE believes that the changes proposed in the *Australian Human Rights Legislation Bill 2003* seriously threaten the independence of the commission, have the potential to dilute the expertise of the Commission and will weaken the educative role of the Commission.

APPENDIX A

SUMMARY OF COMMISSION INTERVENTIONS

YEAR	NUMBER OF CASES	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
1988	1.	**Re A Teenager**	Family Law - Sterilisation of a young woman with a disability	Family Court
1991	1.	**Secretary, Department of Health and Community Services v JWB & SMB (In re Marion (No.1))**	Family Law - Sterilisation of a young woman with a disability	Family Court
1992	1.	**Mount Isa Mines Ltd**	Employment Law - OH&S issues	Full Federal Court
	2.	**R v Cheung**	Criminal Law – Right to a fair trial	NSW Supreme Court
1994	1.	**John Briton, Acting Public Advocate (Victoria) v GP and KP and the Human Rights and Equal Opportunity Commission**	Family Law – Consent to surgical treatment	Family Court
	2.	**ZP & PS**	Family Law - Abduction of a child	High Court
	3.	**Minister of State for Immigration and Ethnic Affairs v Teoh**	Family Law - Deportation of the father of seven children	High Court
	4.	**P v P: Re Lessli**	Family Law – Sterilisation of a young woman with a disability	Family Court Full Family Court High Court

YEAR	NUMBER OF CASES	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
	5.	**In re Marion (No.2)**	Family Law - Sterilisation of a young woman with a disability	Family Court
1995	1.	**C, LJ & Z v Minister for Immigration and Ethnic Affairs**	Refugee Law – 'One child policy' of the Peoples Republic of China	Federal Court Full Federal Court
	2.	**Wu Yu Fang v Minister for Immigration and Ethnic Affairs and Commonwealth of Australia**	Refugee Law - Access to lawyers by persons in detention	Federal Court Full Federal Court
	3.	**Re: Katie**	Family Law - Sterilisation of a young woman with a disability	Family Court
1996	1.	**Albert Langer v Australian Electoral Commission**	Electoral Law – Freedom of political speech	Full Federal Court
	2.	**Rodney Croome & Nicholas Toonen v The State of Tasmania**	Constitutional Law- Alleged inconsistency between State and Federal legislation	High Court
1997	1.	**B v B**	Family Law – Relocation of mother and children away from father	Full Family Court
	2.	**Qantas Airlines Limited v John Christie**	Employment Law- Meaning of 'inherent requirements'	High Court

YEAR	NUMBER OF CASES	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
1998	1.	**Kartinyeri & Gollan v The Commonwealth of Australia (the Hindmarsh Island Bridge case)**	Constitutional Law- The race power in s 51(xxvi) of the Constitution	High Court
	2.	**Death of Andrew Ross**	Coronial inquest - Death of indigenous youth in custody	NT Coroner's Court (common law *amicus curiae*)
2001	1.	**Ben Ward & Ors v The Northern Territory & Ors**	Native Title Law - Definition of native title rights	High Court
	2.	**Ming Dung Luu v Minister for Immigration and Multicultural Affairs**	Refugee Law – Criminal deportation	Federal Court Full Federal Court
	3.	**Vadarlis and Victorian Council for Civil Liberties v The Commonwealth**	Refugee Law – Tampa litigation	Federal Court Full Federal Court High Court
	4.	**IVF Case**	Constitutional Law- Standing and sex discrimination legislation	High Court
2002	1.	**Rainsford v State of Victoria**	Discrimination Law – Application of the *Disability Discrimination Act 1992* (Cth) to the States	Full Federal Court
	2.	**Attorney-General for the Commonwealth v Kevin and Jennifer**	Family Law – Rights of transgender persons to marry	Full Family Court

YEAR	NUMBER OF CASES	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
	3.	**Peter Martizi and Simon Odhiambo v Minister for Immigration and Multicultural Affairs**	Refugee Law – Guardianship of unaccompanied minors	Full Family Court High Court
	4.	**Pay Equity Case**	Employment Law – Pay equity for casual employees	Australian Industrial Relations Commission
	5.	**Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors**	Native Title Law- Concept of 'abandonment' of native title	High Court
	6.	**NAAV & NABE v Minister for Immigration and Multicultural Affairs**	Refugee Law – Privative clause amendments	Full Federal Court
	7.	**Alsiddig Mohammed**	Refugee Law – '*sur place*' amendments to *Migration Act 1958* (Cth)	Refugee Review Tribunal
	8.	**Ainsworth Games Technology v Song**	Discrimination Law - Family responsibilities and flexible work hours	Full Federal Court
	9.	**Graincorp v Markham**	Employment Law – Sexual harassment	Australian Industrial Relations Commission

YEAR	NUMBER OF CASES	NAME OF CASE	SUBJECT MATTER OF CASE	COURT
	10.	**S134 and S157/ 2002 v Minister for Immigration and Multicultural Affairs**	Refugee Law – Privative clause amendments	High Court
	11.	**VFAD v Minister for Immigration, Multicultural and Indigenous Affairs**	Refugee Law – Power to detain under s 196 of the *Migration Act 1958* (Cth)	Full Federal Court
	12.	**Al Masri v Minister for Immigration, Multicultural and Indigenous Affairs**	Refugee Law – Power to detain under s 196 of the *Migration Act 1958* (Cth)	Full Federal Court
	13.	**Death of Nurjan and Fatimeh Husseini**	Coronial inquest – Death of "unlawful non-citizens" at sea	WA Coroner's Court

To access Submissions by the Human Rights and Equal Opportunity Commission (where available) visit:
http://www.humanrights.gov.au/legal/intervention_info.html