Clifford, Julia (SEN)

From: Corinna Elliott [c.elliott@unsw.edu.au]
Sent: Wednesday, 23 April 2003 3:45 PM
To: Legal and Constitutional, Committee (SEN)
Cc: Margaret Miller; Louise Goodchild
Subject: Submission - NCYLC
Importance: High

Dear Sir/Madam,

We attach a copy of the National Children's and Youth Law Centre's submission.

Contact details for the Centre are as follows:

Mail: UNSW
Sydney NSW 2052

Ph: 02 9398 7488
Fax: 02 9398 7416

Yours sincerely,

Corinna Elliott
National Children's and Youth Law Centre
Tel: 02 9398 7488

22 April 2003

The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam,

Inquiry into the provisions of the Australian Human Rights Commission Legislation Bill 2003

The National Children's and Youth Law Centre ("**NCYLC**") was established in 1993 and is the only national community legal centre working exclusively for, and with, Australia's children and young people. The touchstone of the NCYLC is the United Nations Convention on the Rights of the Child and we aim to promote understanding and adherence to children's rights as fundamental human rights.

As such, we welcome the opportunity to make a submission on the *Australian Human Rights Commission Legislation Bill 2003* ("**the Bill**").

Change of Name

We support the proposed change of name of the Human Rights and Equal Opportunity Commission ("**Commission**") to the Australian Human Rights Commission. In this regard, we believe it is appropriate to have a name that conveys a nation-wide approach; the current name does not achieve this perception.

Veto over the Commission's power to intervene in litigation

The current legislative framework for the operation of the Human Rights and Equal Opportunity Commission does not confer a *right* for the Commission to intervene in any proceedings that involve human rights issues. The Commission's general function to intervene is subject to leave being granted by a court. The proper and correct basis for determining such leave is a judicial one. The proposal to qualify s 11(1)(o) by making the power to intervene subject to the Attorney-General's approval is a serious and unwarranted interference in the judicial process and must be rejected outright for the reasons outlined below.

Firstly, as the provision stands the appropriate arbiter as to whether to allow the Commission to intervene is the court. The court decides on the basis of the Commission's ability to assist the court. Under the proposed change to this provision, that decision-making function will be removed from the court and placed within a political context, namely the Attorney-General. The danger with this transferral lies in the potential for arbitrary decision-making by a member of the government. What was once a determination made within the context of assisting the court in its role, becomes subject to the prevailing political, social and economic mores of the government of the day.

As HREOC has previously stated (Submission No. 11, Human Rights and Equal Opportunities Commission (1998), p2),

> "The independence of the Commission is at the very core of the Commission's ability to perform (and to be seen to perform) its functions with effectiveness, integrity and impartiality."

By giving the government of the day a power of veto over one of the Commission's pivotal functions, the proposal will undermine the basis of the system of rights presently enjoyed, and expected, by Australians.

A most serious concern is that the Attorney-General's power to approve interventions may in certain circumstances give rise to a conflict of interest. Such a threat is of particular concern where the Federal Government or Attorney-General is party to proceedings where human rights are in jeopardy.

There is no evidence to suggest that the Commission has misused its power to intervene or intervened inappropriately. In fact, we understand that to date the Commission has intervened in only 35 matters (Commission Media Release, 27 March 2003). This being the case, it raises the question as to why this provision has been proposed. It serves no useful purpose in terms of improving Australia's human rights legislative framework. On the contrary, it seriously undermines the Commission's ability to perform its functions.

Currently, the Commission's intervention power means that a party will only be allowed to intervene where the court is of the opinion that it would be assisted by the intervention. Surely it should remain that the central role of determining what independent views it requires should remain with the court.

One area of Commission responsibility is the rights of children under the *Convention on the Rights of the Child* (1989). Australia agreed to be bound by the Convention in December 1990. The Australian government has also included the Convention in the human rights responsibilities of the Human Rights and Equal Opportunity Commission. The Federal Government of Australia have recognised the particular vulnerability of children and thus it is undeniable that the negative impact the proposed changes may make to the human rights of adults will only be exacerbated in the case of children.

The Commission has in the past intervened in cases involving children and youth. An example is the case of *B & B* (*re: B & B* (1997) 21 Fam LR 676) involving the relocation of a mother and children away from the father. In its role as intervener the Commission provides expertise and assistance to the courts. It does this through its special competence as the national watchdog of children's rights under the *Convention on the Rights of the Child*. The NCYLC is concerned that this proposal will, at the discretion of government, restrict the Commission's intervention role. The broader interests of the children and youth of Australia are better served and recognised by the specialised knowledge of the Commission than by any other government authority.

Removal of Commission's power to recommend compensation

We strongly oppose the proposal to remove the power of the commission to make recommendations for the payment of compensation in respect of discriminatory conduct or acts inconsistent with human rights, following inquiries under the Act. Despite the fact, or perhaps more importantly as a result of the fact, that these recommendations are unenforceable at present, NCYLC is of the opinion that the further watering-down of these powers is inappropriate and irresponsible. In fact, such limitations may amount to a breach of Australia's international law obligations.

Removal of "specialist Commissioners"

Grouping the various subject areas together may result in a lack of expertise and focus. Such a loss can clearly have only a negative impact on those groups that are politically, economically or socially marginalised. Such a proposal is clearly ignoring the well-established notion that the subject areas of discrimination are so significant that they warrant special commissioners with a particular understanding of those they represent.

The new provision dealing with public awareness

The Bill embodies a proposal to introduce a new s 11(1A) which states the Commission must use and encourage the use of the expression "human rights – everyone's responsibility", and s 11(1B) which provides that the Commission may incorporate the aforementioned expression in its logo and on its stationery. Whilst it is undeniable that human rights are indeed the responsibility of every person, the proposal appears to be an unnecessary limiting factor to the Commission achieving its function of education. Without such clauses, the Commission would be able to tailor his education campaigns more efficiently with reference to the particular issue and audience.

We thank you for considering our submissions.

Yours faithfully,
NATIONAL CHILDREN'S AND YOUTH LAW CENTRE

Margaret Miller
Director

Louise Goodchild
Principal Solicitor