THE AUSTRALIAN NATIONAL UNIVERSITY

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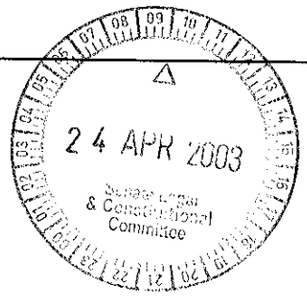

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23 April 2003

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

Dear Secretary,

Australian Human Rights Commission
Legislation Amendment Bill 2003

I am enclosing a submission drafted by eight members of the Law School, including myself, relating to the proposals contained in the abovementioned Bill.

We have joined together largely because of time pressures, but the submission represents the considered opinion of each of us.

Each of us is willing to appear before the Committee, either separately or together, if it so desires.

I am authorised to suggest, on behalf of my colleagues, that it may assist you and the Committee if I offer to be the contact point for any queries you have that are related to the submission. My contact details are noted above.

Yours sincerely

Peter Bailey

Submission to Senate Legal and Constitutional Legislation Committee

Australian Human Rights Commission Legislation Bill 2003

1. We have combined to submit this paper for the consideration of the Committee because we all consider the Bill raises significant issues, and we find ourselves *ad idem* on them. The shortage of time has also been a factor.

2. Three particular issues need addressing. These are, in the order in which they appear in the Bill:

a) The loss of the designated Commissioners
b) The power of the Attorney-General to veto Commission interventions
c) Some aspects of the more emphasised education role.

We regard the first two issues as the most important. Some of us give a slightly higher priority to issue (b).

3. We express our grave concern that the Government has decided to raise the first two issues again, despite some clear opposition both in the community and in the Senate when the *Human Rights Legislation Amendment Bill (No 2)* 1998 was under discussion. We have noted what the Committee said on that occasion in its report and, as will be seen, agree with much of what it said.

a) Designated Commissioners

4. The reasons given for the decision to abolish the current five designated offices seem largely related to matters of governance. The Government has already made changes in the way HREOC operates, particularly through elevating the role and powers of the President. Mention is made of the need to develop a 'collegiate' approach, and to deal with 'intersectional issues'. Reference is also made to the relatively large number of high ranking (in Public Service terms) officers compared to a Department. We commend the moves so far made, and believe they have substantially met the needs for a more cohesive operation.

5. Nevertheless we do take issue with the proposal to remove the designated Commissioners – or perhaps more accurately to designate as 'Human Rights Commissioners' the three that would be retained. This is in our view much more than an issue of governance. We think it strikes at the very core of HREOC's status and role. To remove the designated Commissioners would be to remove a vital part of the thrust of its work. Ironically, it strikes out the very heartland of the effectiveness of HREOC's current promotional roles, which relate to public understanding, awareness and education. The abolition proposal seems inconsistent with the third group of proposals, which are expressly designed to enhance and refine just these functions (see paras 19-22 below).

6. *The governance issue* cannot be overlooked. It may in strictly bureaucratic terms be reasonable to take the view that it is undesirable to have a large number of Commissioner level offices. However, the Commission is not an ordinary line department, and should not be treated as such. The designated Commissioners are at its very core, and are as essential to its overall operation, just as are the separately identifiable Ministers in Departments, and Judges in the courts. True, to keep adding to the numbers of commissioners every time a new group is brought into the purview of discrimination legislation is problematic. But the commissioners for the four core focuses of discrimination law – women, people with different racial or ethnic background, indigenous people, and people with disabilities – provide a strong and valuable support for those whose concerns they stand. Their special

status could and should be preserved. The do, after all, reflect a similar differentiation in international law and practice. The support they give the particular communities should be endorsed and retained rather than impliedly removed.

7. Other groups could be associated with one of the designated Commissioners, as has happened in the past and is still happening. This is not to deny that there is not an issue of governance. There is, but in our view it will not be solved by abolishing the designated Commissioners. Their number should be kept under review, and later additions of grounds for complaint, such as for age, could be looked at when the time arrives. The current 'core' group should, at least for the foreseeable future, be retained. We add that having a line of Commissioners within the one institution is distinctly preferable to multiplying the agencies, as has often been the practice overseas.[1] In any case, it seems unlikely that the list will need to increase in the near future.[2] A Commission with a number of designated Commissioners is workable. Indeed that is the Commission's current mode, and it has been operating well since the useful initiative of the government in placing the complaint function under the President by means of the 1999 legislation. The arrangements, now working well, should not be changed, although as noted below they need not be set for ever in the current form.

8. The *intersectionality issue* is important. But it is not as important as the preservation of the identifiable, accountable and dedicated Commissioners responsible for particular areas. Their separate existence emphasises the intersectionality issue and enhances transparency. The potential conflicts between their several 'representative' concerns are seen as matters for the Commission as a whole, under the one President, to resolve, and are not internalised by the loss of identity of the legislatively designated Commissioners. That positive outcome appears to be what has happened as the new 1999 shape of a more coordinated Commission has settled down.

9. *If cost is of concern,* the Government has consistently emphasised the important role existing domestic institutions play in the protection of human rights and has made appointments of people of substance to the positions as they became vacant. Given the valuable role HREOC has played, and the central role of the designated Commissioners in, importantly, increasing awareness and education about human rights and discrimination, it seems fundamentally at odds with the Government's own assessment to change the structure in this way. The cost element is minor in comparison with the very large amounts the Government has been willing to spend overseas to protect the rights of individuals and groups in other countries, and to support the needs of the international community generally.

10. In relation to the international consequences of the proposal, we recall that the Government has supported the efforts of former Human Rights Commissioner Burdekin in his work in promoting National Human Rights Institutions. He has used the HREOC structure as a significant model, which is being taken up overseas. It would be regrettable if that model were now to be changed in favour of a weaker alternative.

11. Although the *relatively high profile of the Commissioners* may from time to time have been an annoyance to the Government, the Commission is there precisely to be a watchdog both for the community and for the government. It would hardly be

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[1] The separation of the Privacy Commissioner appears reasonable, given the way that area has been developed, but is not a reason for abolishing the other separate Commissioners within the Commission.

[2] The only possibly justifiable addition to the five already designated might be a Children's Commissioner. Other concerns, such as age could, following recent practice, be added to a relevant Commissioner, or a Commissioner with relevant experience.

appropriate to abolish the positions because their occupants have been effective. For virtually no budgetary cost, they have carried the torch for several groups with distinction and their activities have been seen as enhancing Australia's human rights record both at home and abroad. The achievements of each Commissioner, and of the successive occupants, have been admirable – things have happened and perspectives have been added that are unlikely to have resulted from the flat 'commissioner' status the three proposed commissioners would have. What may also not have been recognised is that, beyond the designated officers of the Commission, significant groups in the community will feel disenfranchised and bitter at the abolition of 'their' designated Commissioners – women's groups, ethnic groups, indigenous groups and groups representing people with disabilities. It is not so much the politics, but the fact that people who suffer disadvantage within the community will see as retrograde the dilution of the Commission's capacity and standing by the removal of the small but symbolically important designated offices.

12. Having the designated Commissioners has in part the effect of *personalising the legislative recognition of discriminated groups.* Having a personalised figure to whom complaints can be made, who 'stands for' the relevant group, is of great importance. To remove them, by abolishing the designations, would be like removing the specific titles of Ministers (Treasurer, Prime Minister, Minister for Defence and so on) and simply calling them Minister. The government must be well aware of what is being done, and this an unworthy downgrading of the Commission and what it stands for.

13. **Proposal: retain the present designated commissioners as described above, while recognising that, as circumstances and priorities change, reviews may from time to time be necessary .**

b) The approval of the Attorney-General for Commission interventions

14. An important issue of principle is involved in the propoosals to give the Attorney-General *control over interventions.*We support the earlier recommendations of the Senate Committee on this matter. In general, the relatively few interventions of HREOC have been of considerable value in assisting the Courts to make human rights respecting decisions in relation to disabled children, Aboriginal people, and on employment and migration issues. A body of the nature of HREOC, which has the role of trying to find creative human rights based solutions to difficult problems, should not be prevented access on appropriate occasions. But, given its statutory functions which include potentially taking a view different from the government of the day, it should be the function of the courts, not the Attorney-General, to determine what interventions should be entertained. From the point of view of litigants and the courts, a veto power is an intrusion of the executive into judicial matters. Mere dislike of an occasional intervention of the Commission in a case should no more be a cause for placing one of its important functions under the control of a Minister than it should be in relation to any other statutory body that has similar statutory functions. It would, indeed, be likely to assist the courts if on some (likely rare) occasion it were to receive *amicus* like briefs from both the Government and the Commission. That is not being wasteful, it is part of the hard business of promoting and protecting through law the human rights of all.

15. It is not only that the principle is wrong in terms of the relationship between a government and statutory agencies. It is also wrong that the Parliament should in this way be giving back power to the executive to interfere in important functions of the body it has created. Further, the government may quickly find that this action will generate calls by many in the community who will want the same thing done to protect them in relation to the activities of other statutory bodies whose conduct they dislike. The very purpose of a statutory authority is to create distance between it and the responsible Minister. That should not be blurred by giving her or him a power to intervene in this kind of function. If it has not taken this veto power, the government can then if it desires criticise the body (or appear in disagreement). The

Commission should be allowed to act first, and not become a creature of the Attorney-General. Pressure groups who want the Minister to control legal interventions in their interest will be unremitting in criticism, whether the Minister allows or disallows the intervention.

16. It has been felt *necessary for constitutional reasons* relating to the separation of the judicial power to provide in the Bill that where the President of the Commission is or was a federal judge, she or he should give notice of an intervention, but that the approval of the Attorney-General will not be required. The constitutional point may be well taken. But those who will be appointed as President will have a status equivalent to that of a judge, even if not one, as is the case with the current incumbent. Given the wisdom of the Constitution on the one hand, and the sensitive functions of the Commission on the other, the same requirement should apply without distinction. That is, the President should in all cases advise the Attorney-General in timely fashion to give an opportunity to consult, rather than in some cases be subject to a veto.

17. The grounds listed in the legislation that may be taken into account by the Attorney-General when considering an intervention are not unreasonable. But instead of making them grounds for the Attorney-General to consider, they should be grounds for the President and Commission itself to take into account. If desired, the Commission could be required to report to the Attorney on its action, as the judge/President is required to do, and to include relevant information in its annual reports.

18. **Proposal: the Attorney-General should not have power to approve or veto a proposed intervention. If some communication with HREOC on interventions is desired, it should be as is proposed for the President if a Judge. Decisions by HREOC about interventions should be based on criteria such as are included in the bill, and the annual report should be required to give details for Parliamentary and public scrutiny.**

c) The enhanced educational role of the Commission

19. The *enhanced educational role* is welcome, provided it is adequately resourced. The changes to the legislation here are achieved in two ways. First, three existing functions of the Commission as spelled out in s 11(1) are moved, two of them unchanged, to the top of the list of functions. The third, relating to promotion of an understanding and acceptance and public discussion of human rights, is varied by adding at the end '*and of the responsibility of persons and organisations* to respect those rights.' In similar vein, a new function is added:

> (aab) to disseminate information on human rights and *on the responsibility of persons and organisations* to respect those rights.

The effectiveness of the designated Commissioners has been mentioned above (para 5). It seems inconsistent to remove them while claiming that a main aim of the proposals is to enhance the educational and promotional role.

20. The international human rights instruments do refer to responsibilities and duties, and insertion of these phrases is not inconsistent with them. The somewhat juvenile and simplistic insistence in the new subsection 11(1A) that

> ...the Commission must seek to raise public awareness of the importance of human rights by using , and encouraging the use, of the expression **human rights – everyone's responsibility**

runs the risk of evoking ridicule and could become something of a shibboleth for the Commission. So could the permission given in subsec (1B) to use the expression in bold 'in its logo and on its stationery'.

21. More importantly, an issue of principle is raised if the reference to responsibility is used as an excuse for lessening the primary responsibility of the state as the holder of dominant power in many of the areas of life in which human rights require protection. Although the Commission is reported by the Attorney-General as having suggested the phrase, it hardly seems the kind of detail that is appropriate in a statute. It would be preferable not to include s 11(1A) or 1(B), but otherwise to revise its functions as noted and leave it to the Commission to carry them out.

22. **Proposal: Proposed subsections 11(1A) and (1B) should be omitted and an assurance sought from the Attorney-General that appropriate additional funding would be given for the enlarged responsibilities for education.**

Jointly submitted by

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