

**SENATE LEGAL AND CONSTITUTIONAL  
LEGISLATION COMMITTEE**

**INQUIRY INTO THE PROVISIONS OF THE  
AUSTRALIAN HUMAN RIGHTS COMMISSION  
LEGISLATION BILL 2003**

**SUBMISSION**

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**Submission to the Senate Legal and Constitutional  
Committee**

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

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**Women's Rights Action Network Australia  
24 April 2003**

Written by Amrita Dasvarma on behalf of the Women's Rights Action  
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## Women's Rights Action Network Australia

The objects of the Women's Rights Action Network Australia (WRANA) are to facilitate Australian activism for the promotion and protection of women's human rights in domestic and international arenas through:

education and training for women in Australia to ensure that national and international human rights mechanisms are accessible, understandable and relevant in the lives of women in Australia;  
training for women in Australia to enable their participation in national and international human rights machineries;  
advocacy for effective national and international mechanisms for the promotion and protection of women's human rights within Australia and more broadly;  
documentation and raising awareness of women's human rights violations and abuses within Australian society.

WRANA recognises the indivisibility of human rights, and the need to develop informed critiques on the current human rights system, particularly relating to the capacity of the human rights framework to respond to the diversity of women's experiences through the application of an intersectional definition of discrimination.

Members of the Women's Rights Action Network - Australia endorse the principles of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the Universal Declaration of Human Rights, and work towards the creation of a society which respects and protects all human rights.

The Human Rights and Equal Opportunity Commission (HREOC) has contributed invaluable to many of the projects WRANA has initiated and been involved with. Without this input, the success of WRANA's work, and the work of non-government organisations in Australia, may have been compromised. For this reason, WRANA believes a non-government organisational perspective is crucial to the discussion about the Australian Human Rights Commission Legislation Bill 2003.

### Introduction

The following submission from the Women's Rights Action Network Australia (WRANA) addresses the critical issues raised by the proposed Australian Human Rights Commission Legislation Bill 2003 (AHRC Bill). While WRANA opposes the AHRC Bill in its entirety, this submission focuses on two particular proposed changes, which will have great detrimental impact on the capacity and effectiveness of the Human Rights and Equal Opportunity Commission as a national human rights institution. The two areas of focus are:

- Removing specific portfolio commissioners and appointing 3 generalist commissioners

- Removing the Commission's power to intervene in cases directly with Court approval except where approved by the Attorney-General

### Removing specific portfolio commissioners and appointing 3 generalist commissioners instead

In his speech to Parliament at the second reading of the AHRC Bill, the Attorney General comments that replacing the specialist commissioners with three generalist human rights commissioners will “take into account the possibility of new areas of commission responsibility...[and] the fact that human rights issues increasingly cross over the portfolio specific boundaries of the existing structures..”

It is commendable that the Attorney-General recognises the intersectionality of human rights issues, especially as it is an emerging area of anti-discrimination law both in Australia and globally. However, the Attorney-General's commitment to issues of intersectional discrimination is meaningless without commensurate legislative and resourcing support. Unless the anti-discrimination Acts<sup>1</sup> which direct the Commission are expanded to identify the intersectionality of discrimination, there is no guarantee that the proposed generalist commissioners will consider the overlap of issues when dealing with discrimination. Further, combining the responsibilities of the portfolio specific commissioners and creating three generalist commissioners to protect and promote the human rights of all Australians does not recognise that certain sectors of the population require more protection and advocacy than others.

The purpose of anti-discrimination law and therefore of the Human Rights and Equal Opportunity Commission, is to protect minority groups in Australia: those who may be disadvantaged because of some aspect of their identity, whether it is sex, race, ability, or some other aspect of their life. Intersectional discrimination affects those experiencing more than one form of discrimination simultaneously, people who are often even more marginalized, and in even more need of protection.

The current Commission has begun to recognise the impact of intersecting discrimination, and is undertaking an intersectional approach in some of its work, including for example the collaborative work undertaken by the Race Discrimination and Sex Discrimination Units in the lead-up to and following the United Nations World Conference Against Racism with regards to identifying gender and race intersectionality issues<sup>2</sup> in Australia. This intersectional approach would not have been possible unless specific portfolio commissioners were able to identify critical cross-cutting issues requiring collaborative work. Generalist commissioners, without the

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<sup>1</sup> The Acts are the *Human rights and Equal Opportunity Commission Act 1986*, *Race Discrimination Act 1975*, *Sex Discrimination Act 1984*, and *Disability Discrimination act 1992*.

<sup>2</sup> Please see the HREOC Issues Paper on Gender and Race Intersectionality at [http://www.humanrights.gov.au/racial\\_discrimination/national\\_consultations/gender.html](http://www.humanrights.gov.au/racial_discrimination/national_consultations/gender.html)

concentrated focus on a particular area of discrimination, may not have the expertise or knowledge to identify intersectional issues. The Attorney-General should commend the Commission for developing strategies to effectively address issues which cross over portfolio boundaries and encourage the Commission's work with increased resource allocations, instead of decreasing the Commission's representative and advocacy capacities.

Dissolving the offices of the specialist portfolio Commissioners will also decrease the public's confidence in the Commission's ability to enforce anti-discrimination principles. The portfolio specific commissioners provide a voice for specific issues, whether it is social justice issues for Aboriginal and Torres Strait Islanders, or sex, race or disability discrimination issues. The creation of these roles symbolizes the Government's commitment to these specific human rights areas, and its willingness to be critiqued by an independent body to ensure it is adhering to its obligations under domestic and international law. Without the offices of the portfolio-specific commissioners, the Government's commitment to protecting the rights of minority groups becomes questionable.

Of particular concern is the possibility that of the three generalist commissioners, none may have significant experience in the community life of Indigenous peoples (as is currently required of the Aboriginal and Torres Strait Islander Social Justice Commissioner); nor is there a provision to guarantee the appointment of at least one woman. Generalist commissioners with the broad mandate of promoting and protecting the human rights of all Australians will not be able to champion any specific human rights issues, as the current Commissioners are able to do, without being forced to justify prioritizing one issue over another, and ultimately pitting one sector of the population against another.

Furthermore, appointing three generalist human rights commissioners to replace five specialist portfolio commissioners, without any further resource allocation, does not signify a commitment to "ensure that [the Commission] is efficient and focused on educating the broader Australian community about human rights issues."<sup>3</sup> Rather, WRANA sees it as part of the Federal Government's continuing strategy to weaken the Commission, which has included budgetary cuts and a refusal to appoint new Disability Discrimination and Race Discrimination Commissioners.

***Recommendation: That the Commission maintain its current structure and that five, full time, specialist Commissioners be reinstated to the Commission. Further, that the Commission be encouraged to develop on-going strategies to incorporate an intersectional, cross-cutting approach to its anti-discrimination work.***

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<sup>3</sup> From Attorney-General's speech to parliament at second reading at AHRC Bill

## Removing the Commission's power to intervene in cases directly with Court approval except where approved by the Attorney-General

WRANA strongly opposes the proposed restriction to the Commission's powers of intervention in court cases without approval by the Attorney General, or notification of the Attorney-General of the Commission's intent to intervene in a court case where the Commission President is a former judge.

The Commission, as part of its functions, has the right to intervene in Court cases that involve human rights and discrimination issues, with the leave of the Court<sup>4</sup>. The Commission has intervened in only 35 court proceedings in 17 years, and has never had an application to intervene refused.<sup>5</sup>

The intervention function applies to the Commission as a whole, unlike the *amicus curiae*, or 'friend of the court' function, which is reserved for special purpose Commissioners<sup>6</sup>. The intervention function allows the Commission to intervene in proceedings involving "human rights issues" which are defined in section 3(1) of the Human Rights and Equal Opportunities Commission Act (HREOCA) as the rights enshrined in the following international instruments<sup>7</sup>:

- International Covenant on Civil and Political Rights
- Convention on the Rights of the Child
- Declaration on the Rights of Mentally Retarded Persons
- Declaration on the Rights of Disabled Persons
- Declaration on the elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

By requiring the Commission to seek approval from the Attorney General each time it intends to intervene in a Court case involving human rights issues, the Federal Government weakens Australia's commitment to the aforementioned international legal instruments, and to the human rights they identify.

It must also be recognised that the Attorney-General is a cabinet member of the Federal Government, which has been involved in 18 of the 35 cases in which the Commission has intervened thus far, in 16 of which the Commission presented a contrary view to the Government. While the Commission falls under the portfolio of the Attorney-general, there is a clear risk of conflict of interest should the Commission seek to intervene in a court matter involving the Government

This proposed requirement also undermines the constitutional separation of judicial and executive powers. The Courts involved in these particular cases

<sup>4</sup> Section 11(1)(o) of the Human Rights and Equal Opportunities Commission Act (HREOCA) 1986

<sup>5</sup> From [http://www.humanrights.gov.au/legal/application/intervention\\_info.html](http://www.humanrights.gov.au/legal/application/intervention_info.html)

<sup>6</sup> from [http://www.humanrights.gov.au/legal/amicus\\_discussion.html](http://www.humanrights.gov.au/legal/amicus_discussion.html).

have the right to refuse HREOC's intervention, but allow it as a matter of necessity to ensure that all relevant issues have been considered in determining a case. The Attorney-General's concern that currently HREOC's court submissions duplicate and waste resources undermines the authority of the Courts and the judiciary to decide what is crucial and relevant information for the case at hand. HREOC also has its own guidelines for interventions which assist to ensure an intervention is necessary and effective use of the Commission's resources.

Lastly, this amendment seriously weakens the Commission's capacity and functions as a national human rights institution as set out in the United Nations *Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights*, or the Paris Principles<sup>8</sup>. These principles identify the attributes needed for an effective and strong human rights institution, and they include the need for independence and autonomy from the government. This amendment breaches both of those principles and would severely compromise the Commission's reputation and standing both within Australia and internationally.

***Recommendation: That the Commission's independence be protected, and any attempt to give the Attorney-General any power to veto Court intervention be rejected.***

#### Other amendments

The AHRC Bill also proposes a number of other changes, such as a name change for the Commission. The proposed name change from Human Rights and Equal Opportunity Commission to Australian Human Rights Commission does not seem controversial. The Attorney-General claims this suggested change was proposed by the Commission's president although the Commission has not yet verified this.

The Bill also removes the provision allowing the Commission to establish a Community Relations Council or an advisory committee, on the basis that these provisions have been rarely, if ever, used. Although the Commission has not used this function effectively, the purposed of the provision is to encourage the Commission to consult and liaise with the broader community. The removal of this provision, without the addition of more effective consultative mechanisms, means that community consultation will happen on an ad hoc basis and will be subject to the whims of individual Commissioners.

The Bill also proposes a by-line for the Commission that implies that human rights are an individual responsibility. This detracts from the responsibility of States as parties to international Conventions and Treaties to respect and protect the human rights of all people in Australia.

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<sup>8</sup> From [http://www.asiapacificforum.net/about/paris\\_principles.html](http://www.asiapacificforum.net/about/paris_principles.html)

Further, WRANA feels that it is inappropriate for legislation to prescribe a by-line or logo for an independent statutory authority.

## **Conclusion**

WRANA opposes the AHRC Bill in its entirety. In particular, WRANA opposes the amendments pertaining to the abolishment of portfolio specific commissioners and the introduction of generalist commissioners, and the proposal that all court interventions by the Commission must be approved, or if the Commission's President is a qualified judge, at least notified to, the Attorney General. The AHRC Bill puts the public perception, function, effectiveness and independence of the Human Rights and Equal Opportunity Commission at grave risk, ultimately risking the efficacy of our national human rights protection system.