# Senate Legal and Constitutional Committee

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

**Submission by**

**The Australian Council of Social Service (ACOSS)**

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## Introduction

An effective and independent national human rights institution is essential. Such an entity protects and advances the rights of all. In particular such entities help to redress the disadvantage that results from discrimination and other infringements of human rights. For example, low income people and others who are disadvantaged tend to have a limited capacity to access legal processes compared with wealthy individuals, private corporate entities or governments.

Institutions such as HREOC are concerned about *human* rights. When assessing proposed changes ACOSS suggests that these be viewed in context not only of international instruments, legal tradition and practices but also of the actual human condition. Those least able to protect their rights are often also those whose rights are most often infringed upon.

The *Australian Human Rights Commission Legislation Bill 2003* proposes a number of changes to the existing legislation. The key concerns of ACOSS about these changes are:

- the limit proposed to the power of the commission to intervene in court proceedings;
- the reduction in the number of Commissioners and the abolition of specialist Commissioners;
- the loss of the power for the Commission to make recommendations for money compensation, and;
- the proposed centrality of the human rights education role for the Commission.

Each of the above proposals are opposed. The proposed name change is not opposed.

In the view of ACOSS, the Bill represents a significant reduction in the powers and independence of the Commission and should be either heavily amended or opposed outright.

The sections that follow discuss each of these issues in somewhat more depth.

*Limiting the Power to Intervene in Court Proceedings.*

There is no demonstrative case that HREOC has misused its power to apply to intervene in court proceedings. HREOC has claimed that over the seventeen years that it has had this power it has been granted leave by courts to do so on 35 occasions. Significantly no such application has ever been denied, suggesting that the courts have viewed such applications to be appropriate. HREOC notes that in eighteen of these matters the Commonwealth has been a party and made submissions contrary to the Commission in sixteen cases.

Given the number of court cases involving the Commonwealth as a party to matters, there is an apparent conflict of interest for the Attorney General, as a member of the Government, to be the arbiter as to whether the Commission should apply to intervene in cases or not. This would appear to be contrary to rules of natural justice and procedural fairness.

In all likelihood the practical affect of this provision is that the courts would be denied, in some instances, the benefit of the expert assistance of the Commission. The court is the best entity to determine which parties should be given leave to appear.

This provision would weaken the power of the Commission by impairing its ability to apply to intervene. In addition it threatens the perceived and actual independence of the Commission by making the exercise of its powers subject, in some instances, to the decision of a political figure. This clearly contradicts the 'Paris Principles' that set standards by which national human rights institutions should operate. Decisions about intervention in court proceedings should remain at the discretion of courts who are independent of the government of the day.

*Reduction of Commissioners and Abolition of Specialist Commissioners.*

Taken together these proposed changes pose a serious threat to the effectiveness of the work of the Commission. If passed, the result would be fewer Commissioners with those remaining having a broader range of human rights areas to cover - a kind of 'no name/no frills' outcome.

Specialist Commissioner positions are important for a number of reasons. They reflect the real and all too common characteristics of human rights infringements – often based on discrimination associated with sex, race, Indigenousness and disability.

Specialist Commissioners provide a public point of identification not only for individuals and for communities of interest such as population-specific community organisations, academics and researchers, specialist lawyers etc. Over time specific laws have been enacted relating to these areas of discrimination. Governments also have agencies established according to the varying needs of diverse groups, often with a particular brief to ensure that those who are disadvantaged are better supported. Specialist commissioners reflecting these realities are important and functional.

Given the continuing role of the Commission in hearing complaints the establishment of relationships between specialist commissioners and relevant community groups are important. Many complainants need the support of such group to proceed with a complaint and to cope with the stress, uncertainty and complexity that such actions engender.

As in the past, there continue to be fundamental social, economic, legal and other factors that have been accepted as justifying specialised laws, and processes aimed at overcoming or addressing human rights infringements and discrimination according to diversity.

Women continue to receive average weekly incomes well below those paid to men. Women bear children and this affects workforce participation, interest in and the need to access childcare, health and other services. Women are overwhelmingly the majority of victims of domestic and family violence and sexual harassment.

Women, unlike other groups identified and discussed below and for whom HREOC has specialist commissioners, are a majority of the Australian population. Human rights infringements and discrimination systemically and regularly confront this majority.

Specialist commissioners addressing the diverse needs of minority communities are also important, in part because these people are in a minority and risk further marginalisation.

Indigenous people are the most disadvantaged group in Australia today and this has been so since colonisation. This is true no matter how disadvantage or poverty are defined (see ACOSS Submission to the Senate Inquiry into Poverty and Senate Inquiry into Progress Towards Reconciliation). Employment, health, education, housing and imprisonment indicators, among many others, are all worse for Indigenous Australians compared with non-Indigenous Australians.

With the Mabo and Wik cases of the High Court and the enactment and amendments to the Native Title Act, Indigenous people also confront a particularly complex and different legal system than do non-Indigenous people. Indigenous people have a markedly different cultural tradition compared with non-Indigenous people and this includes different traditions of law altogether and difficulties imposed by the application of law imposed on them by Australian Parliaments.

People with disabilities are also systematically disadvantaged in the Australian community. This is reflected in the Disability Discrimination Act and is made complex by the diversity of disability and impairments. Disability varies both in type and degree. Types of disability include hearing and sight impairment, intellectual and learning, psychological and psychiatric, physical and acquired brain injury among others. Disability is often positively correlated with age and can be compounded by age related discrimination.

Australia is a multicultural society. People from culturally and linguistically diverse backgrounds face race related discrimination. Racial tension and discrimination has, in recent times, been fuelled by community reaction to war on Iraq and asylum seekers. In its own practices the Commission needs to apply culturally appropriate practices. This is likely to be enhanced by having a specialist Commissioner.

In summary, specialist Commissioners are needed in order to provide the Commission with expertise, a focus upon the specific laws that apply to different groups as well as an understanding of and sensitivity to the diverse needs and experiences each face.

There seems little or no evidence to justify the reduction in the number of Commissioners. Indeed proposed age discrimination legislation would suggest that provision be made for an expansion.

*Proposed Loss of Power to Recommend Compensation.*

The proposal to deny the Commission the power to recommend compensation arising from its deliberations reduces the likelihood that the Commonwealth government would provide compensation in relation to its own activities. While clearly not binding on other entities, denying the Commission the power to make compensation recommendations reduces the likelihood that other parties would offer fair compensation and by doing so increases the likelihood of legal proceedings.

Discrimination and human rights infringements can and do contribute to loss of income and almost always lead to distress for individuals that might reasonably be the subject of compensation.

Compensation recommendations provide some pressure for entities that discriminate and infringe on human rights to prevent and address such unacceptable actions.

Removing the Commission's power to recommend compensation can leave complainants with no choice but to pursue Federal Court relief. This course would leave low income people particularly disadvantaged.

*Proposed Centrality of 'Education'.*

The role of the Commission in performing community education activities around human rights is an important one. However, legislating that this be a 'central role' is opposed.

Priority for human rights education is best achieved through financing such efforts and is best reflected through improved budgets for such efforts. In the absence of such commitment it is difficult to avoid the conclusion that such a legislated provision would result in fewer resources for the important complaints, court intervention and consultation work of the Commission. These activities contribute to community education as do other explicit community education activities of HREOC.

It should also be noted that Commission community education functions are enhanced by having specialist Commissioners who act as a high profile focus for community education in the specific areas of sex, disability, race and Indigenous people.

*Proposed Name Change and Legislated Slogan.*

The proposed name change is perhaps the least contentious of the proposed amendments and is not opposed by ACOSS.

The proposal to legislate a slogan for the Commission is, however, opposed. Such communication devices are typically not embedded within legislation but developed by experts in the context of purpose specific research. This is an unnecessary constraint on the educational work of the Commission and may, as community attitudes and issues change, actually tie the Commission to a slogan that is not effective for all of its purposes.

**ACOSS Contact**

Philip O'Donoghue
Deputy Director
Locked Bag 4777
Strawberry Hills NSW 2012
Ph. (02) 9310 4844 ext. 213
Fax: (02) 9310 4822
Email: phil@acoss.org.au
Web site: www.acoss.org.au