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Submission on the Australian Human Rights Commission Legislation Bill 2003

National Legal Aid (NLA) opposes the Australian Human Rights Commission Legislation Bill ("the Bill"). NLA endorses the submissions of the Human Rights and Equal Opportunities Commission (HREOC) and the Anti-Discrimination Commission Queensland (ADCQ) to the Senate Committee.

NLA opposes five key aspects of the Bill. These are:

1. the restructure of the Human Rights and Equal Opportunity Commission;
2. the restriction of the Human Rights and Equal Opportunity Commission's intervention power;
3. the provision for Complaints Commissioners to be appointed by the Attorney-General;
4. the removal of power to recommend damages or compensation; and
5. the refocussing the Human Rights and Equal Opportunity Commission on education functions.

1. Restructure of the Human Rights and Equal Opportunity Commission

NLA opposes the abolition of the positions of specialist commissioners. NLA is of the view that there is a need for identified portfolio commissioner positions.

Legal Aid offices around Australia have day to day experience with clients from the groups which are represented by the specialist commissioner positions. NLA is of the view that the positions in society of these people are not sufficiently advanced to abandon specialist human rights commissioners for each of the areas. Women continue to experience domestic violence, discrimination in the workplace, sexual harassment and pay inequity. People with disabilities continue to experience difficulties with accessing public

places, discrimination in employment and vilification. People from non-English speaking backgrounds continue to experience discrimination and marginalisation. The indigenous people of this country remain disadvantaged. NLA agrees with HREOC's submission that

The re-structuring which would be effected by the AHRC Bill is unnecessary to achieve the government's objectives, unworkable and confusing. The result of its impact will be to reduce the status of each member as an expert providing leadership to the nation in his or her areas of functional responsibility. The overall effect is to downgrade, by generalising, Australia's commitments to the promotion of human rights and the elimination of discrimination both domestically and internationally where the portfolios of the current Commissioners reflect key international human rights obligations.

NLA is concerned that:

- it will be possible that the proposed new commissioners are not members of the groups the legislation is designed to protect (eg women, indigenous people, people with disabilities) because of the generalist nature of the new positions. NLA believes that it is vital for commissioners to be members of these groups.
- the Bill removes the provision that the person appointed to the position of Aboriginal and Torres Strait Islander Social Justice Commissioner be required to have "significant experience in community life of Aboriginal persons or Torres Strait Islanders". NLA believes that this requirement is vital to the work and expertise of HREOC. The lack of an experienced commissioner in this area, which is so fundamental to the human rights landscape in this country, is also very likely to cause indigenous people to lose confidence in the Commission.
- the reduction in the number of commissioners from five to three substantially reduces HREOC's ability to do its work. NLA supports the retention of the five commissioner positions, the immediate filling of all positions and a corresponding increase in HREOC's budget to accommodate this.
- generalist commissioners are appointed under state and territory anti-discrimination legislation. The identified portfolio commissioners are needed to complement the work of these generalist commissioners and provide an important source of information based on the research done by the units that support them.

NLA supports the creation of new specialist commissioner positions and consequent resourcing if new HREOC responsibilities are introduced or existing HREOC responsibilities are expanded.

2. Restriction of the Human Rights and Equal Opportunity Commission's intervention power

Under the existing legislation, the Human Rights and Equal Opportunity Commission may seek leave of the court to intervene in proceedings that involve human rights issues where the Commission considers it is appropriate to do so.

The courts have, in general, recognised the value of interveners and, specifically, recognised and appreciated the input by HREOC in court proceedings.

The Bill seeks to greatly restrict the intervention power by requiring the Commission to obtain the Attorney-General's consent prior to seeking leave to intervene (except where the Commission President is a current or former High Court or Federal Court Judge).

NLA endorses the submissions made by HREOC and ADCQ and strongly opposes the amendment proposal to restrict the Commission's intervention powers for the following reasons:

- the amendment proposal compromises the Commission's independence and status by treating the Commission as if it were a government department and by bringing the right to argue human rights issues before the courts under political control;
- the amendment proposal would give rise to an actual or perceived conflict of interest if the Commonwealth is a party to a case in which the Commission seeks to intervene. Of the 35 cases where the Commission has used its intervention powers, the Commonwealth has been a party in 18 of those matters and the Commission has made submissions contrary to the Commonwealth in 16 of those matters;
- the amendment proposal pre-empts the authority of the courts by preventing the Commission from approaching a court directly and allowing the court to determine what it needs in terms of independent views and who should be given leave to intervene;
- if the Attorney-General refuses consent, the amendment proposal may result in a reduction in the assistance provided by the Commission to the courts by way evidence concerning human rights standards, principles and perspectives and discrimination issues;
- the amendment proposal is contrary to the United Nations' Principles Relating to the Status of National Institutions which set out international minimum standards for national human rights institutions;
- the amendment proposal creates 'two classes' of Presidents.

- The Attorney General stated in the second reading speech that the purpose of the amendment was to “prevent duplication and the waste of resources and to ensure that Court submissions accord with the interest of the community as a whole”. There appears to be no evidence that the intervention of the HREOC has resulted in a duplication of or a waste of resources. The HREOC demonstrates that the intervention of HREOC has resulted in expenditure of only 0.5% of the HREOC budget.

3. **Provision for Complaints Commissioners to be appointed by the Attorney-General**

The Bill allows the Attorney-General to appoint part-time Complaints Commissioners to inquire into complaints and attempt conciliation and to terminate the appointments of Complaint Commissioners at any time.

NLA notes that currently the Commission employs conciliators to do such work and endorses the submissions made by HREOC and ADCQ namely that the Commission’s current complaint handling system is effective and timely.

The Attorney-General stated in the second reading speech that the reason for this amendment is to assist the President with his or her functions. The President currently has the power to appoint persons outside the Commission if the President requires additional assistance with workload. As a result there is no need for this proposed amendment.

NLA has concerns the amendment proposal has the potential to undermine the independence of the Commission, interfere with its capacity to manage its day to day business and ‘politicise’ the work of Complaints Commissioners.

4. **Removal of power to recommend damages or compensation**

NLA opposes the removal of HREOC’s power to recommend the payment of damages or compensation following inquiries by it into breaches of human rights.

NLA agrees with HREOC’s submission that:

It is the Commission’s opinion that removing the ability to recommend financial compensation for human rights breaches denigrates the pain and suffering that might be experienced in these circumstances. It is accepted legal practice for monetary awards to be seen as an appropriate (if often inadequate) form of compensation for such loss and to deny it to persons who have been found to have suffered a human rights breach is demeaning and trivialises the loss that may be suffered.

In relation to complaints of discrimination in employment under HREOCA, it is unfair that a person who has suffered a loss of

wages as well as pain and suffering as a result of discrimination cannot be the subject of a recommendation for compensation. This is particularly so given the real and accurate manner in which loss of wages can be calculated. It is inconsistent that a person could pursue an unfair dismissal action through the courts and receive an award for compensation but cannot be the subject of a recommendation for compensation from the body vested with the power to inquire into the alleged act or practice of discrimination.

Furthermore, the fact that the recommendation for financial compensation is not enforceable has not deterred respondents from settling complaints under HREOCA - in particular complaints of discrimination in employment. A respondent will be less inclined to settle a complaint if the Commission does not have the power to recommend financial compensation. Moreover, the cases in which the Commission has made such recommendations provide a useful guidance as to the amounts which could be sought or offered in conciliation.

It is therefore NLA's view that while these recommendations are not enforceable, there are many benefits to be gained by retaining the power to make them, eg a number of respondents have paid compensation following recommendations notwithstanding that there is no right to enforce such a recommendation.

5. Refocussing of the Human Rights and Equal Opportunity Commission on education functions

The Bill seeks to re-order the Commission's sets of functions making education and provision of information its primary focus.

NLA endorses the submissions made by HREOC. NLA notes that currently the Commission undertakes the functions of public education and information distribution but its capacity to undertake these functions depends primarily upon its budgetary resources.

NLA is concerned that in an atmosphere of 'budget cuts' the amendment proposals may effectively reduce the Commission's role in providing redress for breaches of human rights and independent scrutiny of compliance with international conventions, both of which are vital functions of any human rights institution.

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