

**NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC**

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The Secretariat  
Senate Legal and Constitutional Legislation Committee  
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Thursday, 24 April 2003

Dear Committee Members,

This is a joint submission of the New South Wales Council for Civil Liberties and the University of New South Wales Council for Civil Liberties (referred to in this document as the “Councils for Civil Liberties”).

The Councils for Civil Liberties would like to thank the Committee for this opportunity to make a written submission to the Inquiry into the provisions of the *Australian Human Rights Commission Legislation Bill 2003*.

The Councils would also appreciate the opportunity to make oral submissions to the Committee in Sydney on 29 April 2003.

The University of New South Wales Council for Civil Liberties is an autonomous branch of the New South Wales Council for Civil Liberties based at the University of New South Wales. Its members are students at the university.

We hope that our submissions, both written and oral, will prove useful in the review process.

Yours Sincerely,



Cameron Murphy, President, New South Wales Council for Civil Liberties  
for  
Jeremy Styles, Secretary, New South Wales Council for Civil Liberties



Michael Walton, University of New South Wales Council for Civil Liberties  
for  
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## Table of Contents

<b>1.</b>	<b>EXECUTIVE SUMMARY</b> .....	<b>3</b>
<b>2.</b>	<b>INTERVENTION</b> .....	<b>5</b>
2.1	CONCLUSIONS OF COMMITTEE’S 1998 REPORT STILL STAND.....	5
2.2	AG’S VETO UNDERMINES HREOC’S INDEPENDENCE.....	5
2.3	AG’S VETO CONTRAVENES PARIS PRINCIPLES .....	6
2.4	AG’S VETO WILL AFFECT HREOC’S LEADING ROLE IN THE REGION .....	7
2.5	FEDERAL JUDGE AS PRESIDENT .....	8
2.5.1	<i>inconsistent operation of AG’s veto</i> .....	8
2.5.2	<i>mandatory provision might be unconstitutional</i> .....	9
2.6	PROPOSAL LACKS ANY MECHANISM OF ACCOUNTABILITY .....	10
2.6.1	<i>no requirement for AG to give reasons</i> .....	10
2.6.2	<i>lack of review of AG’s decision to veto</i> .....	10
2.6.3	<i>AG’s decision should be non-delegable</i> .....	11
<b>3.</b>	<b>REPLACEMENT OF SPECIALISED COMMISSIONERS</b> .....	<b>12</b>
3.1	PROBLEMS WITH REPLACEMENT.....	12
3.1.1	<i>institutional competency</i> .....	12
3.1.2	<i>transparency</i> .....	12
3.1.3	<i>simplicity</i> .....	13
3.1.4	<i>efficiency</i> .....	13
3.2	PARIS PRINCIPLES .....	13
3.3	PRIVACY COMMISSIONER ISSUE.....	13
3.4	PREFERENCE FOR THE 1998 MODEL.....	13
3.5	COMPARATIVE MODELS.....	14
3.6	PROBLEM OF TRANSITIONAL PERIODS .....	14
3.7	CREATION OF COMPLAINTS OFFICERS.....	15
<b>4.</b>	<b>DAMAGES</b> .....	<b>16</b>
4.1	COMMISSION’S RECOMMENDATIONS OF DAMAGES SAVE TIME AND MONEY .....	16
4.2	THE IMPORTANCE OF DAMAGES .....	16
4.3	THE MEANING OF BRANDY V HREOC .....	17
4.4	AUSTRALIA’S OBLIGATIONS UNDER INTERNATIONAL LAW .....	17
<b>5.</b>	<b>OTHER SUBMISSIONS</b> .....	<b>18</b>
5.1	RENAMING OF THE COMMISSION.....	18
5.2	“HUMAN RIGHTS – EVERYONE’S RESPONSIBILITY” .....	18

## 1. Executive Summary

The main concerns that the Councils for Civil Liberties have about the *Australian Human Rights Commission Legislation Bill 2003* (“the AHRC Bill”) are:

- the proposal to grant the federal Attorney-General (“the AG”) an effective veto over the intervention of the Human Rights and Equal Opportunity Commission (HREOC) in the courts;
- the replacement of the specialist commissioners with generic commissioners; and,
- the removal of HREOC’s ability to recommend payment of damages or compensation.

### **Proposal to give AG a veto over HREOC intervention**

The Councils for Civil Liberties are concerned that the Committee has dealt with similar proposals to those in the AHRC Bill as recently as 1998. The Committee’s conclusions and recommendations were correct in 1998 and they still stand in 2003. As far as the Councils are concerned, nothing has changed in the intervening years to warrant a conclusion different from the Committee’s 1998 recommendation to abandon the proposal and maintain the status quo.

Nevertheless, the Councils remain concerned that:

- the independence of HREOC will be undermined at the AG’s discretion;
- by losing some of its independence from government, HREOC will lose its status as a leading National Human Rights Institution (NHRI) in our region;
- the proposal lacks any mechanism of accountability for the exercise of the AG’s discretionary veto power;
- the relative autonomy afforded Federal judges does not extend to non-judges;
- the requirement for Federal judges to report to the AG might be unconstitutional; and,
- the *Paris Principles* are not being observed.

**The Councils for Civil Liberties recommend that the proposal to grant the Attorney-General a discretionary power to veto the Commission’s intervention in the courts not proceed. The proposal undermines the independence of Australia’s National Human Rights Institution, threatens the Commission’s status as a regional leader and fails to provide effective accountability measures.**

### **Proposal to replace Special Commissioners**

For reasons of maintaining institutional competency and for reasons of transparency, simplicity and efficiency, the Councils for Civil Liberties do not support the administrative change replacing specialised Commissioners with three “general purpose” Commissioners.

The Councils are also concerned that the abolition of specialist Commissioners could weaken the plurality of the Commission. Pluralist representation in NHRIs is a major recommendation of the *Paris Principles*.

The Councils encourage the addition of provisions to cater for the transition period from the old to the new Commission. In the interests of maintaining public confidence in the Commission, existing Commissioners should be seen to complete their described terms.

In the event that the Parliament proceeds with general commissioners, then the Councils express a preference for the 1998 model in which the number of commissioners was reduced to three and each “Vice-President” had mixed responsibilities of: social justice and race; sex discrimination and equal opportunity; and human rights and disability.

Furthermore, in the event that the Parliament proceeds with reducing the number of Commissioners, the Councils support the introduction of complaints officers. These complaints officers will be able to aid the Commissioners with their increased workload.

**The Councils for Civil Liberties do not support the administrative change replacing specialised Commissioners with three “general purpose” Commissioners.**

#### **Proposal to remove HREOC’s ability to recommend damages and compensation**

The Councils for Civil Liberties are concerned that if the Commission can no longer recommend the payment of damages or compensation, then it will lead to increased litigation and costs, and a greater caseload for the Federal Court. This is because, without the considered recommendation of an independent ‘umpire’ as a guide, parties are more likely to test the quantum of their damages claim in court rather than settle out of court.

**The Councils for Civil Liberties recommend that the Commission be able to recommend payment of damages and compensation. Consequently the proposal to limit the Commission’s remedial options should not be restricted as this Bill attempts to do.**

#### **Other Proposals**

**The Councils for Civil Liberties support the Commission’s change of name to the Australian Human Rights Commission.**

**While the Councils have no objection to the Commission using the slogan “human rights – everyone’s responsibility”, the Councils for Civil Liberties do not support this provision of the Bill. The Councils are concerned that the Commission *must* use the slogan. The Councils are also concerned that if the Commission should wish to change the slogan, then it will have to seek the approval of Parliament.**

**For the Committee’s information:** UNSWCCL has prepared a consolidated version of the *HREOC Act* and the changes proposed by the AHRC Bill. A softcopy has been sent with this submission. The document is also available from the Council for Civil Liberties’ website: <http://www.nswccl.org.au/issues/hreoc.php>.

## 2. Intervention

Currently HREOC may seek leave of the court “to intervene in proceedings that involve human rights”<sup>1</sup> and “discrimination issues”.<sup>2</sup> This statutory function of the Commission has been used on many occasions,<sup>3</sup> most recently and notably in the *Tampa*,<sup>4</sup> transsexual marriage<sup>5</sup> and IVF cases.<sup>6</sup>

The AHRC Bill proposes to restrict this function by granting the federal Attorney-General a right of veto over such intervention,<sup>7</sup> unless the President is a Federal or High Court judge or magistrate, in which case the President must inform the AG of an intention to seek leave to intervene and reasons for that intervention.<sup>8</sup>

The Councils for Civil Liberties are opposed to this interference with the independence of Australia’s National Human Rights Institution, HREOC.

### 2.1 Conclusions of Committee’s 1998 Report still stand

Noting the Senate Legal and Constitutional Legislation Committee’s 1998 report on an almost identical provision,<sup>9</sup> the Councils for Civil Liberties submit that the arguments made against the 1998 proposal still stand in relation to the 2003 veto proposal.

Foremost among those arguments are:

- there is no evidence that HREOC has abused its intervention power;
- the change threatens HREOC’s independence and may constitute a conflict of interest for the AG;
- HREOC’s intervention aids the courts; and,
- it is the role of the courts, not the AG, to determine who will intervene.

As far as the Councils for Civil Liberties can determine, nothing has changed in the intervening years to warrant a conclusion different from the Committee’s 1998 recommendation to abandon the proposal and maintain the status quo.<sup>10</sup>

### 2.2 AG’s veto undermines HREOC’s independence

HREOC is vested with the role of national human rights watchdog.

To carry out effectively its statutory duty to guard human rights and equal opportunity, HREOC must at all times be, and be perceived to be, independent of government. This

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<sup>1</sup> *Human Rights and Equal Opportunity Act 1986* (Cth) (“HREOCA”) s 11(1)(o)

<sup>2</sup> HREOCA s 31(1)(j)

<sup>3</sup> HREOC, *Summary of Commission Interventions*, [www.hreoc.gov.au/legal/guidelines/table\\_interventions.pdf](http://www.hreoc.gov.au/legal/guidelines/table_interventions.pdf), accessed 17/4/2003

<sup>4</sup> *Victorian Council for Civil Liberties v MIMA* (2001) 182 ALR 617; and *Ruddock v Vadarlis (Tampa Case)* (2001) 183 ALR 1

<sup>5</sup> *AG (Cth) v Kevin & Jennifer* [2003] FamCA 94 (21 February 2003)

<sup>6</sup> *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16 (18 April 2002)

<sup>7</sup> *Australian Human Rights Commission Legislation Bill 2003* (Cth) (“AHRC Bill”) item 26, inserting s 11(5); item 39 inserting s 31(2)

<sup>8</sup> AHRC Bill item 26, inserting s 11(6); item s 39 inserting s 31(3)

<sup>9</sup> Senate Legal & Constitutional Legislation Committee, *Provisions of the Human Rights Legislation Amendment Bill (No.2) 1998 (as introduced in the 38<sup>th</sup> Parliament): Consideration of Legislation Referred to the Committee*, February 1999, [www.aph.gov.au/senate/committee/legcon\\_ctte/human2/report](http://www.aph.gov.au/senate/committee/legcon_ctte/human2/report), accessed 20 April 2003.

<sup>10</sup> note 9, recommendation no.2

is because part of HREOC's mandate is to watch over governmental, as well as private, conduct.

Like the Ombudsman, or any other watchdog whose duties include overseeing governmental and administrative conduct, independence is vital for maintaining public confidence in the institution.

If the AG were ever to exercise this proposed veto, then that decision might lack legitimacy in the eyes of some – particularly if the party against whom HREOC is intervening is the Commonwealth.

This Bill proposes to grant the government the power to muzzle the human rights watchdog, at least in terms of its power to intervene in the courts, whenever it suits the government. Undermining HREOC's independence in this way is not, to use the AG's own phrase, "in the broader interests of the community".<sup>11</sup>

The Councils for Civil Liberties do not recommend that Parliament legislate in a manner that undermines the independence of the Commission.

### **2.3 AG's veto contravenes Paris Principles**

The *Paris Principles* are a set of international recommendations that address the role, composition, status and functions of National Human Rights Institutions (NHRIs).<sup>12</sup> They have been endorsed by the UN Office of the High Commissioner for Human Rights<sup>13</sup> and the UN General Assembly.<sup>14</sup> They were used extensively by the Committee in its 1998 report, where the Principles were reproduced in an appendix.<sup>15</sup>

The *Paris Principles* were agreed to in the context of a growing worldwide interest in creating and strengthening NHRIs and set the international benchmark for such institutions. The *Paris Principles* seek to encourage robust and effective institutions that can protect and promote human rights at the national level.

Some of the key principles specify that NHRIs should:

- be given as broad a mandate as possible;<sup>16</sup>
- be given strong and independent advisory responsibilities;<sup>17</sup>
- be able to freely consider any matter within their competence, including matters taken up on their own volition without approval from a higher authority;<sup>18</sup>
- be provided with an adequate infrastructure and funds to operate smoothly, independently and with stability;<sup>19</sup> and,
- be composed in such a way so as to guarantee a pluralist representation.<sup>20</sup>

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<sup>11</sup> Williams, Daryl, Second Reading Speech to *AHRC Bill*, *Hansard*, House of Representatives, 27 March 2003 at 11:05am

<sup>12</sup> Office of the High Commissioner for Human Rights, *Fact Sheet No.19: National Institutions for the Promotion and Protection of Human Rights*, 1993, <http://www.unhchr.ch/html/menu6/2/fs19.htm>, accessed 21 April 2003.

<sup>13</sup> UNHCHR resolution 1992/54 of 3 March 1992

<sup>14</sup> UNGA resolution A/RES/48/134 of 20 December 1993

<sup>15</sup> note 9 at Appendix 3

<sup>16</sup> *Paris Principles*, note 14, "Competence and Responsibilities", point 2

<sup>17</sup> *Paris Principles*, note 14, "Competence and Responsibilities", point 3(a)

<sup>18</sup> *Paris Principles*, note 14, "Methods of Operation", point (a)

<sup>19</sup> *Paris Principles*, note 14, "Composition and Guarantees of Independence and Pluralism", point 2

<sup>20</sup> *Paris Principles*, note 14, "Composition and Guarantees of Independence and Pluralism", point 3

Requiring the Commission to gain the approval of the Attorney-General to intervene in a proceeding is a violation of the first three principles summarised above:

- it narrows the mandate of HREOC;
- it is a fetter on the forum in which HREOC can exercise its advisory role; and,
- it limits the freedom of HREOC to pursue matters of its own choosing.

Ultimately, such a proposal could lead to an environment that would severely curtail the independence and effectiveness of the institution.

In summary, the AHRC Bill represents a significant and unjustified departure from the *Paris Principles*, especially those relating to independence. Furthermore, the Bill runs counter to the UN General Assembly resolution that endorsed the *Paris Principles*. That resolution called on States to strengthen – not weaken – their human rights institutions and to adopt the *Paris Principles*.<sup>21</sup> In this regard, the Bill is out of step with the opinion of the majority of international States.

## **2.4 AG's veto will affect HREOC's leading role in the region**

In his Second Reading speech the AG commended the Commission on its leading-role status in the region:

The government is proud that Australia has a human rights record that is among the best in the world and our national human rights institution is regarded as a leader in our region.

These reforms will ensure that the new Australian Human Rights Commission is equipped to continue to contribute effectively to this record in the coming years.<sup>22</sup>

Unfortunately the AG's intervention proposal will seriously undermine HREOC's status as a leader in our region.

The Commonwealth Secretariat has released a set of Best Practice principles for National Human Rights Institutions (NHRI),<sup>23</sup> in which the Secretariat describes the requirement of independence as “fundamental”.<sup>24</sup> In cases where an NHRI is created by statute, as in Australia, the Secretariat says this of best practice:

To guarantee the continued existence of an NHRI established by statute, the statute should have fixed provisions, amendable only by a special majority vote of the parliament, *guaranteeing the existence and political, operational and financial independence of the national institution*.<sup>25</sup> (italics added)

The Secretariat further states that:

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<sup>21</sup> note 14, §§ 2, 3 & 12

<sup>22</sup> note 11

<sup>23</sup> Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, Legal and Constitutional Affairs Division, 2001, <http://www.thecommonwealth.org/pdf/humanrights/BestPractice.pdf>, accessed 17 April 2003

<sup>24</sup> note 23 at 5

<sup>25</sup> note 23 at 12

The executive has the responsibility to ensure that NHRIs are adequately resourced and that all agencies of the executive respect the independence of the NHRI.<sup>26</sup>

Of those jurisdictions that have given their NHRI a statutory power of intervention,<sup>27</sup> the Councils for Civil Liberties are not aware of one that gives the government an effective veto over that statutory (or constitutional) function.

The proposal to grant the AG a veto over HREOC's intervention power will seriously undermine, if not destroy, HREOC's leading status in our region. HREOC will stand *behind* the NHRIs of such nations as Fiji, New Zealand and India, at least when it comes to its independence from the Executive.

Furthermore, this veto proposal offers no support or comfort to nascent regional NHRIs trying to establish or maintain their independence from their governments.

Given the AG's praise for HREOC in his Second Reading Speech, this consequence must be unintentional and unforeseen. The Parliament should not enact this provision as it will undermine the Commission's status as a leader of regional NHRIs.

## **2.5 Federal judge as President**

The main difference between the 1998 and 2003 intervention proposals is that the new amendments limit the AG's discretionary veto power to circumstances where the Commission's President is not a Federal or High Court judge or magistrate (a "Ch III judge").<sup>28</sup> This would appear to be a concession to the doctrine of the separation of powers; a concession to the judicial power of the Commonwealth, exercised by judicial officers under Ch III of the Commonwealth Constitution; and designed to avoid the problem encountered in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.<sup>29</sup>

In *Wilson* a Federal Court judge had been appointed to prepare a report on the Hindmarsh Island Bridge development for the Minister. The High Court held that the function of reporting to a Minister is *incompatible* with the separation of powers between Executive and Judiciary.<sup>30</sup>

### **2.5.1 inconsistent operation of AG's veto**

The effect of this concession to the separation of powers is an inconsistency that allows the AG to overrule some Presidents but not others. In other words, the government appears to acknowledge that it is important not to interfere with a President who is a Federal judge, but can see nothing wrong with interfering with a President who is not. The reasoning behind this inconsistency is not clear.

Furthermore, it should be noted that the Governor-General, on advice from the government, appoints the Commission's President.<sup>31</sup> This means that the final say as to whether the President is or is not a Federal judge falls to the government. In other

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<sup>26</sup> note 23 at 28

<sup>27</sup> examples: *Human Rights Commission Act 1999* (Fiji) s 37(2); *Protection of Human Rights Act 1993* (India) s 12(b); and, *Human Rights Act 1993* (NZ) s 5(2)(j).

<sup>28</sup> AHRC Bill item 26, inserting s 11(6); item 39 inserting s 31(3)

<sup>29</sup> *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1

<sup>30</sup> note 29 at 20 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ (with whom Gaudron J agreed; Kirby J dissenting)

<sup>31</sup> HREOCA s 8A(1)

words, the power to appoint the President and the power to veto that President's decision to intervene will be vested in the government. There is an obvious conflict of interest in this arrangement: a Ch III President<sup>32</sup> will not be subject to government veto, but the government makes the decision whether to appoint a Ch III judge as President in the first place.

Given this conflict of interest, it is possible that a perception of political interference might arise when the Governor General appoints a non-Ch III President. It might be said, for example, that the government is attempting to influence the Commission's ability to protect and preserve human rights and equal opportunity in Australia by deliberately appointing a President over whom the AG holds a power of veto.

There are two ways to cure this conflict of interest. The first is to legislate that the Commission's President is, as is the case of the President of the AAT,<sup>33</sup> always a Ch III judge. This is not an ideal solution because it greatly restricts the pool from which a President can be drawn. There is no valid reason to insist that a President of HREOC be a Federal judge.

The second, and in the opinion of the Councils for Civil Liberties the preferable, solution is to maintain the status quo and not to grant the AG a discretionary power of veto over a President's decision to intervene in the courts.

## 2.5.2 mandatory provision might be unconstitutional

Drafted as it is, to avoid a violation of the doctrine of the separation of powers, the provision might still be open to constitutional challenge.

If a challenge were mounted to the AHRC Bill's statutory requirement that a judge "must give the Attorney-General written notice of the Commission's intention to seek leave to intervene", then a court could hold that such a mandatory requirement was incompatible with the judicial function of a Ch III judge.

For example, the High Court made it clear in *Wilson* that:

...where a [Ch III] judge is appointed as a presidential member of the Administrative Appeals Tribunal, the function of deciding applications must be performed independently of any instruction, advice or wish of the Executive Government.

...Independence from the Legislature and the Executive Government in the sense thus explained is essential to the constitutional compatibility of performing a non-judicial function with the holding of the office as a Ch III judge.<sup>34</sup>

The most likely consequence of such a finding would be to strike down the sub-sections relating to Federal judges:<sup>35</sup>

The effect of the application of the constitutional doctrine [of incompatibility]...is not to vacate the office to which the Ch III judge has been appointed but to

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<sup>32</sup> i.e. a President who is a Federal (Ch III) judge

<sup>33</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 7(1): "A person shall not be appointed as the President unless he or she is a Judge of the Federal Court of Australia"

<sup>34</sup> *Wilson*, note 29 at 18 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ

<sup>35</sup> i.e. AHRC Bill item 26, inserting s 11(6); item 39 inserting s 31(3)

sterilise the power with the protection which the Constitution gives to the independence of Ch III judges.<sup>36</sup>

There is no certainty that such a constitutional challenge would succeed, but the possibility of such a challenge illustrates another aspect of the uncertainties that this veto proposal presents at law.

## **2.6 Proposal lacks any mechanism of accountability**

The proposed change to the intervention powers of HREOC are inadequate because they lack *any* accountability mechanism for the exercise of the AG's discretionary veto power. At the very least, Parliament should require the AG to give reasons for his or her decision and that a decision should be reviewable, as an administrative decision, in the AAT. Given the great sensitivity of such a decision, the AG's discretionary veto power should also be non-delegable.

Ultimately, the Councils for Civil Liberties do not think that any number of accountability measures would cure the problems with the proposal for a discretionary veto power and hence the Councils maintain their position that this proposal should be abandoned.

### **2.6.1 no requirement for AG to give reasons**

It is concerning that there is no provision in the AHRC Bill for a statutory obligation imposed on the AG to give reasons for his or her decision to veto the Commission's intervention.

This is even more worrying given the common law position that, absent a statutory duty, a decision-maker is under no obligation to give reasons for his or her decisions.<sup>37</sup>

Given that under the proposed changes a President who is also a Federal judge would be under a statutory duty to give the AG reasons for intervention,<sup>38</sup> it seems odd that the AG should not also give reasons for his or her decision. This would help alleviate the problem of any perceived bias or interference on the part of the Minister when exercising the discretionary veto power.

### **2.6.2 lack of review of AG's decision to veto**

Another concern, also raised in the 1998 inquiry, is that no review lies to the AG's decision to veto intervention.

Under the current proposal no appeal of the exercise of the AG's discretionary veto would lie to the AAT.<sup>39</sup> An appeal would lie only to the Federal Court.<sup>40</sup>

This is *not* efficient. It could result in a party choosing to go off to the Federal Court to seek stay of proceedings pending a review of the AG's decision to veto HREOC's intervention.

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<sup>36</sup> *Wilson*, note 29 at 16 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ

<sup>37</sup> *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 662 per Gibbs CJ; at 676 per Deane J.

<sup>38</sup> AHRC Bill item 26, inserting s 11(6); item 39 inserting s 31(3): "together with a statement of why the Commission considers it appropriate to intervene".

<sup>39</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 25: an enactment must grant jurisdiction to the AAT.

<sup>40</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1): as a decision of an administrative character made...under an enactment.

This process *increases* the caseload of the Federal Court, *increases* costs to all parties and *delays* the primary proceedings. It is hard to see how this proposal will help to “prevent duplication and the waste of resources” – the stated objectives of the AG.<sup>41</sup>

There is a subsidiary question of who is competent to make such an appeal. In the federal courts, any “person aggrieved by a decision” may make application for review of an administrative decision<sup>42</sup> on a set of specified grounds.<sup>43</sup> In the AAT any person “whose interests are affected by the decision” may apply for review of a reviewable decision.<sup>44</sup> This appears to suggest that the party on whose behalf HREOC had intended to intervene would be able to challenge the AG’s veto.

### **2.6.3 AG’s decision should be non-delegable**

Given the sensitive nature of vetoing the Commission’s intervention in the courts, Parliament should expressly state that the AG’s discretionary power of veto should be non-delegable.

In other words, only the AG *personally* should be able to make the final decision to veto.

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<sup>41</sup> Second Reading Speech, note 11

<sup>42</sup> *ADJR Act* s 3(4)

<sup>43</sup> *ADJR Act* s 5(1)

<sup>44</sup> *AAT Act* s 27(1)

### **3. Replacement of Specialised Commissioners**

The Councils do not support the administrative change replacing specialized Commissioners with three “general purpose” Commissioners.<sup>45</sup>

#### **3.1 Problems with replacement**

Reasons of institutional competency are at the head of this submission, followed by the issues of transparency, simplicity and the related question of efficiency.

##### **3.1.1 institutional competency**

The principle submission of the Councils is that the competency of the Commissioners will be diminished by the effect of the current Bill.

*Firstly*, the Bill removes the capacity for appointment of people with specialist competencies to the specialist Commissioner roles.

*Secondly*, the Bill reduces the capacity of commissioners to focus and specialize within the role, during the course of their appointment.

*Thirdly*, the Bill reduces the capacity of staff under commissioners to similarly develop competencies within the particular role.

*Fourthly*, and importantly, the Bill reduces the ability of the Commissioners to develop public profiles related to particular issues. This reduction in profile diminishes the capacity of the Commissioners to undertake education and investigation of particular issues within their portfolios.

##### **3.1.2 transparency**

The current structure of specialized commissioners is conducive to bureaucratic and public transparency.

The current Commission is bureaucratically transparent given that the current structural roles are relatively discrete (for many purposes) under the relevant statutes. The chain of accountability for particular tasks is an obvious line relating to the structure.

The current structure is also publicly transparent. The role and purpose of the Commission is in some sense described to the public by the definition of the subject Commissioners. A member of the public who investigates the role of the Commission will be informed by the structure of the Commission. It will be obvious that the Commission has responsibility for the specializations of the Commissioners. For all its symbolic importance the title of “human rights” is not as transparent as the system of named specializations. The specializations, as subsets of Human Rights, provide information to the public about both the role of the Commission generally and about the correct specialist Commissioner to whom their questions or complaints should be addressed.

By contrast the proposed structure renders opaque the decision-making process necessary for the undertaking of tasks within the Commission.

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<sup>45</sup> principally in the amendments undertaken in AHRC Bill item 13 amending HREOCA s 8(1)

A further consideration is the chance that the operation of the Commission under the Bill will fall into the current pattern – merely having removed the names from the Commissioners. It is possible that Commissioners would eventually be acting *de facto* under the subject areas of the present named Commissioners. This outcome is likely given the nature of the Commission’s work having reference to subject based Commonwealth Acts. If this “*de facto* specialist” structure occurs, this would merely effect a reduction in transparency. This possible result of the current Bill is not supported and the current existing structure is strongly preferred by the Councils.

### **3.1.3 simplicity**

The Bill, in removing the specialized Commissioners, appears to create a simpler structure. However, the creation of three equal commissioners without recourse to statutory distinction of roles ultimately leads to a more complex structure.

The organization of the work within the Commission would be made more complex by the additional organization necessary to allocate tasks. The allocation would (as above) reduce the transparency in the operation of the Commission, and would either create an administrative burden or be affected by *de facto* action in the current work separations.

### **3.1.4 efficiency**

The new structure necessarily leads to an increase in the work involved in the administrative allocation of tasks to particular Commissioners. As above, the removal of specialist Commissioners holding special competencies would mean that each Commissioner had less opportunity to develop efficient practices within a specialized area. The operation of the entire Commission would thus be less efficient.

## **3.2 Paris Principles**

The abolition of the portfolio Commissioners could have the effect of weakening the pluralist representation on the Commission. Pluralist representation in the composition of national human rights institutions is recommended by the *Paris Principles*.<sup>46</sup> Such representation should reflect the composition of the movement to promote and protect human rights.

The appointment of portfolio Commissioners is an easily identifiable way of demonstrating this plurality. On this basis also the abolition of specialist Commissioners is not supported.

## **3.3 Privacy Commissioner Issue**

The Councils submit that the separation of the Privacy Commissioner from HREOC in the changes after the 1998 Bill<sup>47</sup> is generally indicative of the value of specialized commissioners.

## **3.4 Preference for the 1998 model**

Alternatively, in the case that the Government presses the reduction in number of Commissioners, the Councils express a preference for the 1998 model<sup>48</sup> over the current model. In that model the proposal was to reduce the number of commissioners to three,

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<sup>46</sup> *Paris Principles*, note 14, “Composition and Guarantees of Independence and Pluralism”, point 3.

<sup>47</sup> as inserted in the *Privacy Act 1988 (Cth)*, s19ff. Noting the separation of the Privacy Commissioner from HREOC by action of the *Privacy Amendment (Office of the Privacy Commissioner) Act 2000*.

<sup>48</sup> *Human Rights Legislation Amendment Bill (No.2) (1998)*

each with mixed responsibilities. The three proposed Vice-Presidents in that model Bill were:

- social justice and race;
- sex discrimination and equal opportunity; and,
- human rights and disability.<sup>49</sup>

The Councils submit that the change to three commissioners having these or similar subject separations is preferable to the three “general” human rights Commissioners proposed in the current Bill.

It is noted that the current administration, having reduced the number of appointments, has effectively implemented a similar model. The current Commissioners, through acting in alternate portfolios, have acted in a fashion similar to the 1998 model. The Councils submit that the current *de facto* structure is not a desirable model. A transparent statutory structure is preferred.

If the Commission is seen as “top-heavy” in its management, the organization could be re-arranged to have a President (part or full time), two Commissioners “Human Rights” and “Discrimination” and the full complement of deputy commissioners acting in the subject areas of the current statutory Commissioners. This would reduce the list of highly ranked members and leave in place the institutional competencies. The Deputy Commissioners could be responsible for complaints handling and other specialist undertakings.

### **3.5 Comparative models**

Some of the region’s National Human Rights Institutions (NHRIs) have general rather than specialist commissioners.<sup>50</sup>

However, the Councils preference is for the current Australian model, which is also found mirrored in the New Zealand model. The New Zealand model has a senior commissioner and specialized commissioners in the areas of race relations and Equal Opportunities.<sup>51</sup> Additionally, the New Zealand model has a series of part-time Commissioners.<sup>52</sup>

### **3.6 Problem of transitional periods**

The Councils support the Senate Legal and Constitutional References Committee 1998 Report on the issue of transitional periods.<sup>53</sup> The current Commissioners should serve out their terms in an equivalent position under the new system. Such an outcome is essential to the continuing independence of the Commission as an independent statutory institution.

That report refers to the *Paris Principles – Relating to the status of National Institutions*. Where:

In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be

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<sup>49</sup> note 9, § 3.2

<sup>50</sup> for example: Fiji, *Human Rights Commission Act 1999* (Fiji) ss 2, 17; and, India, *The Protection of Human Rights Act 1993* (India), s3.

<sup>51</sup> *Human Rights Act 1993* (New Zealand), s 8 (1)(a) and (b).

<sup>52</sup> *Human Rights Act 1993* (New Zealand), s 8 (1)(c).

<sup>53</sup> note 9, §§ 3.11-3.22; recommendation #4 (bill should be amended to provide transitional arrangements for existing commissioners).

effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.<sup>54</sup>

The Councils rely upon the Principles and the Report of the Committee in asserting that the existing Commissioners should complete their described terms. This outcome is extremely important in maintaining the integrity and legitimacy of the Commission and the Government generally.

### **3.7 Creation of Complaints Officers**

Alternatively, in the case that the number of Commissioners is reduced as under the current Bill, the Councils support the Bill's construction of three "complaints officer" positions in the Commission.<sup>55</sup> This is a valuable change in the event that the number of commissioners and their specialist competencies are reduced. The complaint handling of the Commission is an important function and the construction of a tier of specialist complaints officers is of obvious value as support for the Commissioners who would experience increased workloads under the new bill.

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<sup>54</sup> *Paris Principles*, note 14, "Composition and Guarantees of Independence and Pluralism", point 3.

<sup>55</sup> AHRC Bill item 29 inserting subsection 19 (1A).

## 4. Damages

At present, the Commission can recommend the award of damages or compensation when it determines that a person has suffered loss or damages resulting from an act or practice that “is inconsistent with or contrary to any human right”<sup>56</sup> or that “constitutes discrimination”.<sup>57</sup> Such recommendations are unenforceable, requiring only that the Commission make a report to the Minister about its findings.<sup>58</sup>

The changes proposed in the AHRC Bill remove this recommendatory power, and specifically exclude the Commission from making any recommendations as to monetary damages or compensation.<sup>59</sup>

### 4.1 Commission’s recommendations of damages save time and money

Though the determinations of the Commission are recommendatory only and parties must go to the Federal Court to re-litigate the matter to obtain an enforceable remedy,<sup>60</sup> determinations involving recommendations of monetary damages and compensation nevertheless serve a useful purpose. A determination gives the parties a monetary figure around which to negotiate an out-of-court settlement. In cases where such a settlement is reached the monetary figure provided by HREOC serves to shorten rather than prolong litigation.

The proposed removal of HREOC’s power to recommend the payment of damages or compensation will mean that parties will be left with a determination that an act or practice contrary to human rights or that is discriminatory has occurred, but they will have no monetary figure around which to base negotiations for settlement. This may lead to a greater willingness of parties to commence action in the Federal Court. If this is the outcome, then the proposed changes will prove *more expensive*, not less; *less efficient*, not more; and will lead to an increase in the caseload of the Federal Court.

### 4.2 The importance of damages

It is clear from the language of the *HREOC Act* that remedies must be available to individuals who have been subject to human rights violations or discrimination. With this in mind, the motivation behind the removal of the power to recommend damages in the current Bill is unclear. It may simply reflect the (unfounded) belief that the Commission is an inappropriate instrument for the handling of such issues. In the alternative, it may also imply that damages are themselves an inappropriate remedy for human rights violations.

While ‘human rights breaches’ are defined on a case-by-case basis by HREOC, it is clear that they may include violations of a severe nature. For example, they may involve the deprivation of liberty, the infliction of physical and mental harm, and the denial of entitlements, such as health care or legal advice. The ramifications for the affected individual can be far-reaching, and may certainly include economic loss, both immediate (e.g. the destruction of property) and consequential (e.g. medical expenses).

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<sup>56</sup> HREOCA s 29(2)

<sup>57</sup> HREOCA s 35(2)

<sup>58</sup> HREOCA ss 29(2)(d) & 35(2)(d)

<sup>59</sup> AHRC Bill item 35 replacing s 29(2)(c); item 42 replacing s 35(2)(c)

<sup>60</sup> Douglas, Roger, *Administrative Law*, 4<sup>th</sup> Edition, Federation Press, Sydney, 2002, p.44

In such cases, it is clearly important that compensation and damages be made available to the victims of human rights breaches in order to provide an effective remedy. The AHRC Bill undermines this directly by removing a key driver for the provision of compensation. It also undermines the rights of victims indirectly, by implying that the award of damages would be inappropriate. It is crucial that the Government acknowledge and support human rights by fostering, rather than corroding, the principle of remedies.

### **4.3 The meaning of *Brandy v HREOC***

In *Brandy v HREOC*<sup>61</sup> it was held unanimously that determinations of the Commission are not enforceable because it is not a court. It has been suggested that this context provides an appropriate impetus for the removal of the power to recommend damages. However, a close examination of the issues reveals much space for alternative interpretations.

Although the general aims of the Commission may be connected to education and conciliation, it also has a vital role to play in remedying human rights violations. This is implicitly acknowledged in the current Bill, since all of the Commission's other powers with relation to remedies remain intact.<sup>62</sup> It is "in the broader interests of the community as a whole" that HREOC retain all the powers that enable it to fulfil this remedial role.

Similarly, the effect of *Brandy v HREOC* was merely to invalidate enforceable recommendations. While it may also imply that recommendations as to damages bear a 'quasi-judicial' quality, this does not render them invalid; nor does it suggest that this is inappropriate in itself. It could be argued that the intention underlying this power was not to create a quasi-judiciary. The intention of Parliament was to allow the Commission to make appropriate recommendations to the Minister in cases of human rights violations. This goal is not in question, although its essence would be severely undermined by the current proposal to remove the power to recommend monetary damages and compensation.

### **4.4 Australia's obligations under international law**

Australia is a signatory to the *International Covenant on Civil and Political Rights* (ICCPR). Under the Covenant, Australia is required to provide an 'effective remedy' to the victims of human rights violations.<sup>63</sup> Australia must also provide mechanisms for the determination and enforcement of such a remedy.

The current HREOC Act is the only legislation in Australia which contains a direct remedy for human rights breaches. While other channels exist for an individual to seek recompense (i.e. proceedings in the Federal Court), these are relatively inaccessible.

The Commission's broad ability to recommend action to reduce the loss or damage suffered by a person is therefore an important aspect of Australia's adherence to its international obligations.

In short, removing the Commission's power to recommend the payment of damages and compensation would severely limit its capacity to assist in the provision of an 'effective remedy', and may constitute a breach of the ICCPR.

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<sup>61</sup> *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245

<sup>62</sup> "other than the payment of compensation or damages": AHRC Bill item 35 replacing s 29(2)(c); item 42 replacing s 35(2)(c)

<sup>63</sup> ICCPR Article 2(3)(a)

## 5. Other submissions

### 5.1 Renaming of the Commission

The Councils for Civil Liberties have no objection to the change to the name of the Commission to the Australian Human Rights Commission.<sup>64</sup> The change in principle focus to “Human Rights”, rather than the current broader title, is supported by the Councils.

It is however noted that the acronym thereby created – AHRC – is identical in acronymic form (and in three of four words) to both the Asian Human Rights Commission, a longstanding Hong Kong-based Non-Governmental Organisation,<sup>65</sup> and the Australian Human Rights Centre, a research centre based at the University of New South Wales.<sup>66</sup>

### 5.2 “human rights – everyone’s responsibility”

While the Councils have no objection to HREOC using the slogan “human rights – everyone’s responsibility”,<sup>67</sup> it seems curious that a Commission’s slogan would be enshrined in legislation this way. Should the Commission decide that in the future it wishes to re-brand itself by choosing a new slogan, it will require an Act of Parliament to do so. This seems rather excessive. The purpose of inserting this slogan in a statute is not obvious.

It is also curious that the use of the slogan is made mandatory by the phrase “the Commission *must*”.

The AG’s Second Reading Speech sheds little light on why the slogan has been legislated and why its usage is mandatory. The AG states only that the legislated slogan “supports the legislative refocus of the Commission’s functions and reflects the common terminology by which the Commission is often referred”.<sup>68</sup> It may very well do that, but the main effects remain that the Commission *must* use the slogan and if it wants to stop using it the Commission must go to Parliament to seek approval.

The further provision that “the Commission may incorporate the expression in its logo and on its stationery”<sup>69</sup> is baffling. Surely the Commission already has the authority to use its own slogan on its own logo and on its own stationery.

In the interests of simplicity, and in not cluttering legislation with trivial and unimportant matters, the Councils for Civil Liberties recommend that this provision be removed. This will also ensure that the Commission is free to choose and change its slogan without requiring the approval of Parliament.

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<sup>64</sup> AHRC Bill item 12 amending HREOCA s 7(1)

<sup>65</sup> see [www.ahrchk.net](http://www.ahrchk.net), accessed 22 April 2003.

<sup>66</sup> see [www.ahrcentre.org](http://www.ahrcentre.org), accessed 23 April 2003 (email address: [ahrc@unsw.edu.au](mailto:ahrc@unsw.edu.au))

<sup>67</sup> AHRC Bill item 25 inserting HREOCA s 11(1A)

<sup>68</sup> note 11

<sup>69</sup> AHRC Bill item 25 inserting HREOCA s 11(1B)