

Submission to the Senate Legal and Constitutional Legislation Committee

**Inquiry into
Australian Human Rights Commission Legislation Bill 2003**

Introduction

1. Liberty Victoria (the Victorian Council for Civil Liberties Inc.) is an independent, non-government organisation, which traces its history back to the first civil liberties body established in Melbourne in 1936.
2. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law. Liberty has campaigned extensively in the past on issues concerning democratic processes, government accountability, transparency in decision-making, and open government.
3. Our most visible campaigns on these issues in recent years have concerned the attempts by the previous Victorian Government to curb the powers of the State Auditor-General, the Federal Court legal action in 2001 arising from the Federal Government's detention of asylum seekers on board the *MV Tampa*, and the Federal and Victorian Government responses to the terrorism threat.
4. We welcome the opportunity to comment on the Federal Government's proposed Australian Human Rights Commission Legislation. We hope that the Committee will be able to hold a hearing in Melbourne or facilitate our appearance before the Committee in Sydney or Canberra, to enable us to respond to issues of particular concern to the Committee.

General observation

5. Liberty Victoria is deeply concerned by the proposed amendments to the structure and functioning of the Human Rights and Equal Opportunities Commission (HREOC), and to related human rights law, proposed by the *Australian Human Rights Commission Legislation Bill 2003*.

Commission's power to seek leave to intervene in court proceedings

6. Liberty strongly opposes the proposal to require the Commission to gain the Attorney General's consent prior to seeking leave to intervene in cases involving human rights and discrimination. It is the function of the court to decide whether intervention should be permitted. For the Attorney General to determine whether the Commission can intervene comes perilously close to interference with the judicial process.
7. There is no evidence the Commission has abused its power. On the contrary, HREOC has carefully and effectively intervened in situations concerning some of the most disenfranchised groups in Australian society – actions which are central to a genuine watchdog/public advocate role in a democratic and human rights-positive culture. Liberty Victoria fully supports the independent exercise of the power to seek leave to intervene. The 'wider interests in society' referred to by the Attorney General are diverse and sometimes conflict. Without the support of a body such as HREOC they are likely to reflect the interests of the more powerful groups in society, in ways that adversely affect the rights of minorities.
8. Politicising the process of seeking leave to intervene by definition serves the political interests of particular governments and not necessarily the interests of the community. It is an anathema to the protection and extension of human rights for the government of the day to be granted the power to intervene in this way. Even a perfunctory examination of the history of human rights abuses demonstrates that some of the worst recorded abuses have taken place at the hands of executive government.
9. Liberty and the Commonwealth Government were parties in the *Tampa* litigation in which HREOC also intervened. Liberty's experience of that litigation

demonstrated how politically charged the protection of human rights can be, even to the point of the government monitoring its legal opponents phone calls. If the present Bill is passed the executive government will have power to prevent the independent human rights watchdog from assisting the court where the executive is at the forefront of alleged abuses and is even actively using covert methods to noble its legal opponents preparation for court. Requiring government approval completely undermines the role of the HREOC as an independent advocate and by extension its role to protect and promote human rights. Given that the enhancement of such promotion and protection is the objective of the Bill this result will clearly undermine the Bill's fundamental objective.

- 10.** Liberty also notes the emphasis in the Explanatory Memorandum on 'the human rights of all Australians'. The protection and promotion of human rights for all is already fundamental to the aims and language of human rights legislation and treaties, and has been since the United Nations Charter was first developed. However, it is always recognised that particular social groups are in many societies more likely to be vulnerable to human rights abuse. Such an acknowledgment is reflected over the world in the wording of human rights law and the structure of human rights bodies, which have been concerned with the particular human rights of women, Indigenous peoples and refugees, alongside universal declarations and laws protecting fundamental human rights and civil liberties for all. It is not at all clear to Liberty Victoria how a 'human rights for all' argument can justify the changes proposed by the Bill, unless it is implied that the present structure does not or cannot serve such a purpose. This is not advanced in the material accompanying the Bill and Liberty is aware of no evidence to support such a claim.
- 11.** It is crucial that the independence of the Commission in the exercise of its intervention powers is retained so that the Commission can continue monitoring and promoting Australia's human rights obligations for the benefit of all Australians. We note that the Senate Legal and Constitutional Committee

recommended a similar provision be removed from an earlier bill introduced by the Government in 1998, and the same course must be adopted here.

Power to recommend payment of damages and compensation

12. The removal of the Commission's power to recommend compensation and damages in disputes seriously undermines the enforcement of human rights in Australia. Liberty calls on the government to strengthen human rights protection by granting the Commission power to order the payment of compensation and damages, with such orders to be enforceable in the Federal Magistrates' Court.
13. We particularly draw the Committee's attention to Article 2 (2) and 2 (3) of the International Covenant on Civil and Political Rights. Since signing this treaty, Australia has been obligated to ensure effective remedies to people whose human rights have been violated, and to ensure that competent authorities shall enforce such remedies. The removal of compensation and damages from the range of available remedies effectively means there is no remedy in many cases. Compensation and damages orders provide necessary deterrence, particularly where there is a significant resource and power imbalance.

Structure of executive

14. The proposal to replace the identified portfolio Commissioners with three Human Rights Commissioners will significantly reduce rather than enhance the functioning of the Commission with respect to indigenous rights.
15. The Aboriginal and Torres Strait Islander Social Justice Commissioner will be abolished and his current responsibilities and activities will continue only at the discretion of the President. There will be no requirement in any of the three Commissioner positions for significant experience in the community life of Aboriginal or Torres Strait Islander persons. These changes will substantially weaken subsequent Commission consultative processes with Indigenous peoples and erode existing networks and trust relationships which have been developing for the promotion of human rights awareness and avenues of redress. We note that a similar proposal to abolish the Social Justice Commissioner position was

strongly criticised in 1999 by the UN Committee on the Elimination of Racial Discrimination against a background of grave concerns about violations against Australian Indigenous peoples.

16. The Attorney General (News Release 27/3/03) refers to better equipping the Commission to take on ‘new areas of responsibility, such as age discrimination, and manage the increasing incidence of issues which cross human rights boundaries, such as matters relating to women with disabilities’. We agree that a ‘multiple’ or ‘cross over’ approach to human rights issues is often necessary, but this goal could be effectively achieved by incorporation into the existing Commission structure and practices.

Commission’s educative role

17. Liberty Victoria agrees that education is fundamental to the promotion of a climate in which human rights are understood and respected. However, as the Attorney General notes, education already plays an important role in the existing Commission’s activities and Liberty is concerned greater legislative priority to educational measures may be at the expense of procedures and policies to enforce human rights obligations. Human rights violations often entail the abuse of a weaker party and the violating party may have powerful inducements to maintain the abuse in the absence of effective sanctions.
18. While the notion of everyone bearing responsibility for human rights is an important goal, governments bear the primary responsibility to uphold the human rights of others. The Australian Government not only has the power to do this in relation to individuals, corporations and its own practices, it is *obligated* to take prime responsibility under international human rights treaties. This primary role for government must not be diluted into a generalised responsibility.

Complaint handling and the new ‘Complaints Commissioners’

19. Liberty Victoria requires more information in order to comment, especially in relation to the part-time status of the Commissioners.

Community Relations Council and advisory committees

20. In the absence of any detailed rationale for removal rather than facilitation of the processes, Liberty opposes it as a further weakening of the Commission's role. The advisory committees and the Council enhance the education role of the Commission and Liberty considers that removing these bodies runs counter to the stated intention of strengthening the education function.

Conclusion

21. By its ratification of international human rights conventions and covenants, the Australian Government is obligated to take the lead in fostering a strong human rights environment. As noted, the present Bill contains some elements with the potential to strengthen such an environment, but given the more fundamental and detrimental changes proposed these are unlikely to be successful. In the absence of constitutional protection, such as a Charter of Rights and Freedoms, HREOC is especially important as an independent watchdog and public advocate for the most disenfranchised in Australian society.

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