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SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

ON THE AUSTRALIAN HUMAN RIGHTS COMMISSION BILL

April 2003

Introduction

The Refugee Council of Australia (RCOA) welcomes the opportunity to provide input to the Senate Legal and Constitutional References Committee's inquiry into the Australian Human Rights Commission Bill.

The Refugee Council of Australia is the peak non-governmental agency in Australia concerned with issues relating to refugees and asylum seekers and represents over 90 organisational members and a similar number of individual members. The Council works to promote humane, flexible and legally defensible policy towards refugees, asylum seekers and displaced peoples by the Australian Government and the Australian community.

Because of the symbiotic relationship between refugee and human rights law and the necessity to ensure that the most vulnerable groups within any community, amongst whom it can be argued are refugees and asylum seekers, are afforded the full spectrum of their rights as set out in the international treaties to which Australia is a signatory, the Council has taken an interest in the current Bill. RCOA would like to make it clear from the outset that we oppose any measures to further limit the powers of the Human Rights and Equal Opportunity Commission.

Comments on the Proposed Amendments

It is important to acknowledge that while the Human Rights and Equal Opportunity Commission (HREOC) was established by Parliament, it is not, and nor should it be, simply an arm of Executive Government. Its purpose is, inter alia, to be an independent watchdog using its specialist expertise to address human rights issues wherever they occur. This will invariably mean that there will be times it will be in full agreement with the Government's objectives on a certain matter and others where it might appear to be in opposition. The salient point is that the decision to act one way or the other has nothing to do with politics or political agendas; it is based on an expert assessment of human rights law.

In its creation of HREOC, the Government acknowledged the importance of an independent human rights monitoring body in a robust democracy. The commitment of the current

Government to this as a point of principle would not appear to have waned, if one can judge by the energetic promotion of national human rights institutions within our region and further afield.

RCOA is thus concerned that the present amendments that seek to curtail the powers of the Commission to seek leave to give expert evidence in matters before the Federal or High Courts both undermine one of the prime purposes for the existence of the body and send an ambiguous message to those governments with whom Australia is engaged in discussions about the creation of national institutions.

In addition, RCOA argues that:

- the decision as to whether the expertise that can be provided by the Commission is relevant to the court is one that best rests with the Court as appointed arbiter. The Attorney General who is often a party to the matter, can not be seen as unbiased. Any attempt by the Attorney to prevent HREOC from offering its services to the Court could well be construed as interference and contrary to the principle of separation of powers. Further, RCOA suggests that careful consideration should be given to whether the amendments are Constitutional and to whether they give a power to the Attorney that might be seen to be contemptuous of the power of the Court;
- the amendments are contrary to the Paris Principles that set out the minimum standards for national human rights institutions. The Paris Principles provide that a national institution vested with competence to promote and protect human rights shall “freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner”.^[1]

Further, it must be conceded that the relevance of international human rights obligations to domestic law is a currently matter of considerable controversy in Australian Courts and where jurisprudence is evolving. The Council considers that it is vital for HREOC to be able to play an unfettered role in this process. The importance of this can be seen in the recent decision of the Full Federal Court in the matter of MIMA vs Al Masri (FCAFC70. 15 April 2003) in which HREOC was granted leave to intervene. At paragraph 155, the decision states:

We are therefore fortified in our conclusion that s 196(1)(a) should be read subject to an implied limitation by reference to the principle that, as far as its language permits, a statute should be read in conformity with Australia's treaty obligations. To read s 196 conformably with Australia's obligations under Art 9(1) of the ICCPR, it would be necessary to read it as subject, at the very least, to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention. It follows from our earlier discussion that we consider the language of the statute in question does permit the implication of such a limitation

In this, the expert guidance of HREOC is clear, as is the significance of this judgement in developing jurisprudence on the important issue of mandatory detention of asylum seekers.

Conclusion

The Refugee Council therefore recommends that the Committee oppose the amendment that will alter the intervention powers of the Commission.

[1] The full text of the Principles can be found at:
www.asiapacificforum.net/about/paris_principles.html