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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

HUMAN RIGHTS COMMISSION BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
Senator the Honourable P.D. Durack, Q.C.)

HUMAN RIGHTS COMMISSION BILL 1981

Outline

The Bill honours an undertaking in the 1980 Policy Speech that a Human Rights Commission would be established. The Commission will be charged in relation to Commonwealth laws and acts or practices under those laws, with promoting the observance of human rights and with investigating complaints that such rights have been violated (clause 9). To this end, it will have inquiring, conciliating and reporting functions, and a promotional and educational role.

The points of reference for the Commission when promoting human rights and investigating complaints will be the International Covenant on Civil and Political Rights and three Declarations - concerning respectively the rights of the child, of mentally retarded persons and of disabled persons. The texts of these instruments are annexed to the Bill. The Bill will allow additional international human rights instruments to be declared so as to extend the charter of the Commission (clause 31).

The Commission is seen as a rationalising agency in the human rights field, and it is charged with co-operating with the States (clause 11). It is also empowered to establish links with non-government organisations (clause 17). It will absorb within it the Office of the Commissioner for Community Relations and the Human Rights Bureau.

The only changes of significance from the 1979 Bill are to incorporate into its framework the three Declarations (children, mentally retarded and disabled). These are mainly in the definitions clause and in clause 31.

NOTES ON CLAUSESClause 2 - Commencement

The Act will come into operation by proclamation, the date being set to allow the Human Rights Commission to be ready for business when the Act comes into force.

Clause 3 - Definitions

'Act or practice': the definition has the effect of restricting the scope of the Bill to acts and practices under Commonwealth (as distinct from State or Northern Territory) law.

'Authority': the definition is included to facilitate the operation of clause 11(1) by making it clear that the co-operative arrangements there envisaged can involve both State departments and State statutory bodies or agencies.

'Prescribed persons': this definition, along with that of 'authority', is designed to facilitate co-operative arrangements under clause 11, effective use of staff, and use of the services of other persons prescribed by regulations.

'Relevant international instrument': the declarations envisaged by this definition will be issued after consultation with State and Northern Territory Ministers and will be tabled (see also clause 31).

Sub-clause (2) will require the Commission, in promoting the observance of human rights under international instruments, to have regard to any reservations, declarations etc. which affect their application to Australia.

Sub-clauses (3) and (4) are added to ensure that new international human rights instruments which the Government wishes the Commission to use as a point of reference in its work will not be excluded on technical grounds because their form is not strictly that of a convention or a declaration, or they were not formally ratified by Australia.

Clause 7 - Membership

Sub-clauses (3)-(5). These sub-clauses allow the appointment of full-time and part-time members of the Commission and provide for the Chairman or Deputy Chairman to administer the affairs of the Commission. Initially, part-time appointments can be expected of members other than one of the Chairman or Deputy Chairman. The reference to the Judge (sub-clause (4)) is because of the special arrangements which need to be made where a Judge is appointed as a member of a Commission (see also clauses 8 and 22). The Chairman is to be a Judge or qualified legal practitioner (sub-clause (7)).

Clause 9 - Functions of Commission

Sub-clause (1). This sub-clause sets out the main functions of the Commission. Its main initial functions are likely to be to hear complaints pursuant to paragraph (b) and to review legislation pursuant to paragraph (a). As its work develops, there will be a need to carry out the other functions, perhaps initially with a concentration on those listed in paragraphs (c), (f) and (g) (these relate to advising on action the Commonwealth should take on matters related to human rights and the undertaking and co-ordination of research and educational programs on human rights matters). There is special provision in paragraphs (a), (c), (d) and (e) to enable the Minister to request the Commission to exercise the relevant function.

Sub-clause (2) is designed to ensure that where the Parliament has legislated to provide some form of "affirmative action" or "positive discrimination", e.g. for Aborigines, the Commission will not be obliged to regard that legislation, or actions pursuant to it, as inconsistent with the terms of Articles 2.1 and 26 of the Covenant, or any other instrument

with similar provisions. Such provisions enjoin equality before the law without distinction or discrimination on grounds of race, sex, language, religion etc.

Sub-clause (3) authorises the Commission to work with non-government organisations. The underlying purpose of the Commission is to promote the awareness and observance of human rights in the community and it is planned that it should, wherever possible, work in close liaison with non-governmental bodies. See also clause 17 - consultative committees.

Clause 10 - Powers and Duties

Sub-clause (2) provides for the Commission to report to the Minister. By clause 30 the Minister is to arrange that reports prepared in pursuance of clause 10 and other clauses in this part of the Bill are to be tabled in each House of the Parliament within 15 sitting days of receipt.

Sub-clause (4): the Commission is to avoid encroaching on the functions of other bodies concerned with aspects of human rights, e.g. the Ombudsman. Its function is to ensure that existing machinery is used wherever practicable, and to act as a backstop where that machinery is unable to handle the matter, e.g. because of lack of jurisdiction. At the same time, the Commission is not required to deal with frivolous, vexatious or trivial complaints. In this, its provisions are along similar lines to those in anti-discrimination legislation in the States.

Clause 11 - Intergovernmental Arrangements

Although discussions with the States have not led to fully integrated machinery for the handling of human rights matters, this clause will allow arrangements to be entered into with a State or the Northern Territory where it seems

practicable for the Commission to work with State bodies concerned with human rights or aspects of them. The clause will not allow the Government to by-pass the Commission because any arrangements it makes pursuant to the clause would have to be carried out by the Commission (see also clause 13). The object of clause 11 is to facilitate the work of the Commission and to avoid as far as possible the proliferation of institutions with similar purposes and methods of working, thereby ensuring economy in administration and simplicity of access for members of the public having complaints.

Clause 12 - Form of Inquiries

It is envisaged that in its inquiries the emphasis of the Commission will be on informality and the settlement of points in dispute. Accordingly, this clause provides that the Commission is not to be bound by the rules of evidence in conducting its activities.

Sub-clauses (2) and (3) will allow the Commission to protect the identity of a person making a submission or giving evidence to the Commission.

Clause 13 - Inquiries

Taken with the definition of 'authority' and 'prescribed person' (clause 3), this clause will allow appointment of a member of the Commission, a member of its staff, or a person in a State or Northern Territory department or agency to conduct inquiries into complaints on behalf of the Commission. However, the Commission remains in control of the process and may either incorporate the result of an inquiry in any report it makes to the Minister or determine whether further inquiries or efforts at conciliation are to be made (sub-clause (5)).

Clause 15 - Evidence

The Commission is given power to obtain documents or evidence. The powers are subject to restrictions on the production of sensitive material held by Commonwealth agencies which are modelled on the provisions in the Administrative Appeals Tribunal Act 1975 (section 36) and the Ombudsman Act 1976 (section 9). Except where the document is specially sensitive on the grounds mentioned in paragraphs (a), (b) and (c) of sub-clause (2) (these relate to security, Commonwealth-State relations and the deliberations of Cabinet), the Chairman is to consider whether the document should be disclosed and has the final power of decision. The clause will facilitate the kind of exploratory and conciliating activities, often informal in nature, which are to be at the centre of the Commission's work in relation to complaints.

Clause 16 - Recommendations

The Commission is to achieve its objectives by processes of investigation, conciliation and report, and through the publicity derived from having its report to the Minister tabled in the Parliament. Sub-clause (1) is designed to ensure that, when it reports the result of its inquiries into enactments or proposed enactments, the Commission will make specific recommendations to the Minister in order to concentrate attention on the action the Commission considers should be taken to remedy the difficulty it has discovered. Sub-clause (2) requires the Commission, when reporting on acts or practices, to advise those involved of its findings and authorises it to include recommendations. The Commission's recommendations are not, however, self-executing: implementation will depend upon the action taken by governments and others pursuant to them.

Clause 17 - Consultative Committees

It is intended that the Commission should consult widely with the community, including with representatives of non-governmental organisations and that, subject to the approval of the Minister, it should establish consultative committees for that purpose. The consultative committees would consist of representatives of non-governmental organisations and of such other persons as seemed appropriate to the Commission. See also clause 9(3).

Clauses 18 and 19 - Acting Arrangements

These clauses allow the Minister to appoint a person to act as Chairman or Deputy Chairman in the absence of either of those office holders (actual appointments are made by the Governor-General - see clause 7). Where the Chairman is not a full-time member of the Commission, the Deputy Chairman will be a full-time member. However, clause 7 allows for the possibility that the Chairman could be full-time, in which case the Deputy Chairman could be a part-time member.

Clauses 20-26 - Terms and Conditions for Commissioners

Clauses 20-26 contain relatively standard provisions to apply to the members of the Commission. The Remuneration Tribunal will determine remuneration (clause 21(1)); allowances will be prescribed (clause 21(2)); and other terms and conditions will be determined by the Governor-General (clause 20(4)). There is a standard provision requiring disclosure of interests (clause 26).

Clause 27 - Staff

Members of the staff of the Commission are to be employed under the Public Service Act, and sub-clauses (2) and (3) give the person administering the affairs of the Commission (the Chairman if full-time, or the Deputy Chairman if the Chairman is part-time) the power, status and responsibilities of a Permanent Head under that Act.

Clauses 29 and 30 - Reports

Following examinations or inquiries, the Commission will make reports under clause 16 (see notes above). Under clause 29 the Commission is required to make an annual report, and sub-clause (2) provides that its first annual report is to cover the operations of the Commissioner for Community Relations for the whole of the preceding 12 months, i.e. the Commissioner will cease to make separate reports to Parliament once the Commission is in operation.

Clause 30 requires that reports under either clause 16 or clause 29 are to be tabled in Parliament within 15 sitting days of receipt.

Clause 31 - Declaration of International Instruments

This clause is designed to allow the Commission, if so authorised by the Minister, to apply its inquiring, conciliating, promotional and research functions to international human rights instruments other than the International Covenant on Civil and Political Rights, and the three Declarations (on rights of the child, mentally retarded persons and disabled persons). However, sub-clause (1) provides that an instrument is not to be declared unless the Minister has first consulted with the relevant Ministers in each State and the Northern Territory.

To ensure adequate public record, sub-clause (2) requires Gazettal of the text of the Minister's declaration, of the international instrument, and of the basis on which Australia accepts the instrument.

Any declaration by the Minister of a "relevant international instrument" is, by sub-clause (3), to be tabled in both Houses of the Parliament and to be subject to disallowance, on the same basis as are Regulations. This provision, along with clauses 11 and 34(3), illustrates the importance attached to co-operative relationships with the States.

Clause 32 - Offences

Sub-clause (2) is designed to discourage intimidation of a complainant or of others giving information or evidence in relation to a complaint. It applies where the Commission or an authorised person is holding an inquiry or carrying out an examination and provides for people involved in these proceedings protections similar to those available to a court. Similar protections are provided for inquiries carried out under the Racial Discrimination Act 1975 - see section 27 of that Act (and section 10 of the Racial Discrimination Amendment Act 1980).

Clause 33 - Protection

Sub-clause (1) is similar to the provisions in other legislation where inquiry procedures are authorised, e.g. section 33(1) of the Ombudsman Act 1976. It gives protection to Commissioners and staff acting in good faith against actions for damages (but not against proceedings seeking injunctions or other prerogative writs).

Sub-clause (2) gives protection to persons making complaints to the Commission. The protection applies only in relation to the making of the complaint (or provision of evidence) to the Commission itself, i.e. it is a form of qualified privilege.

Clause 34 - Non-disclosure of Private Information

The Commission is not to disclose information relating to the affairs of an individual except in the course of performing its tasks, e.g. in a report to the Minister under clause 16. However, it is authorised to disclose information to State bodies with which it is co-operating in the discharge of its functions (sub-clause (3)). Without this power, and a reciprocal power in State bodies with which the Commission may be associated, the effectiveness of arrangements made under clause 11 could be materially reduced.

Clause 35 - Regulations

This is the standard general authority for the making of regulations. The only clauses in the Bill in which there is a specific reference to regulations are in -

- . clause 3 - definition of "prescribed person";
- . clause 15(9) - expenses of witnesses; and
- . clause 21 - remuneration.

Clause 36 - Cessation of Operation of Act

This clause will provide Parliament with an opportunity to review the legislation within five years from the date the Act is proclaimed (clause 2). The inclusion of "sunset" clauses in legislation establishing statutory bodies was recommended by the Senate (Rae) Committee report "Statutory Authorities of the Commonwealth".

Sub-clause (2) is necessary to ensure that the protections etc. given by section 8 of the Acts Interpretation Act, e.g. in relation to rights and liabilities under the repealed Act, apply to the Human Rights Commission Act (section 8 applies only where an Act repeals "a former" Act).