

Explanatory Statement

Proposed Amendments from Dr Deb Foskey, MLA

Human Rights Commission Bill 2005;
Human Rights Commission (Children and Young
People's Commissioner) Amendment Bill 2005; and
Public Advocate Act 2005

August 18, 2005

Amendments to the Human Rights Commission Bill 2005

Amendment 1 - Clause 6 – Objects of the Act

This amendment inserts a new function for the Human Rights Commission (HRC) under the objects of the Act. The objects proposed in Clause 6 of the Act focus on the role of the Commission in 1) promoting the rights of individuals within service systems and 2) complaints handling. This amendment articulates a role for the commission in promoting human rights in the community; identifying and examining issues that affect the human rights and welfare of vulnerable groups in the community; and making recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community. While this broader role is not precluded under the Act, it is given little emphasis. We believe that the community expects that the Commission will be proactive in promoting human rights but that this is not articulated well in the Bill. In developing the amendment we looked at consultation feedback on the proposed Human Rights Commission and drew on examples of functions from comparable statutory agencies interstate. Similar amendments are proposed in relation to the functions of the Disability and Community Services Commissioner, Health Services Commissioner and Children and Young People’s Commissioner.

Amendment 2 – Clause 8(2) - New note regarding definition of disability

This amendment inserts a note under the definition of disability in the HRC Bill clarifying that disability is defined differently in the Discrimination Act 1991. It is appropriate that the definition of disability in the Discrimination Act remain much broader than the one in this Act. However, given that some people accessing the Commission will be making discrimination complaints, it is important that the difference in the definitions is highlighted in order to avoid confusion.

Amendment 3 & 6 – Clause 21(1)(aa) & 25(1)(aa) – Additional functions for the Disability and Community Services Commissioner and the Health Services Commissioner

In line with the amendment to the functions of the HRC overall (amendment 1), amendments 3 & 4 insert additional functions for the Disability and Community Services Commissioner and the Health Services Commissioner. A similar amendment is proposed relating to the Children and Young People’s Commissioner. The amendments expand the functions of individual commissioners to encompass the provision of education, information and advice; public awareness, research into issues affecting people with a disability, older people and carers, making recommendations to government and non-government agencies (beyond the context of service delivery) and promoting the participation of individuals in decisions that affect their own lives. The intent is to provide Commissioners with a clear statutory basis for being proactive and engaging with the community.

Amendment 4, 5, 7 & 9 – Clause 21(2), 23(3) & 25(2) – Changes to the Authority of Commissioners

There has been some concern from community groups regarding Commissioners losing individual autonomy and the capacity to make decisions as a result of parallel clauses in the Bill which subordinate the decisions of individual Commissioners to the collective decisions of the Commission overall. These amendments change the parallel clauses to retain the authority of individual commissioners in exercising the functions of their office while remaining subject to decisions of the Commission in relation to administrative matters. This also makes the restrictions that apply to the function of Commissioners consistent with the restriction of the President's functions in Clause 19(2).

Amendments 8, 10 & 11 – Clause 26, 34(1) & 34(3) – Human Rights Commissioner and Discrimination Commissioner

Amendment 8 removes the requirement in Clause 26 of the Bill that one person fills the two positions of the Human Rights Commission and the Discrimination Bill. Amendments 10 and 11 are consequential changes to related examples in Clauses 34(1) & 34(3). While it is the current situation that the Human Rights Commissioner and the Discrimination Commissioner are the same person there does not appear necessary to enshrine this in legislation. At some time in the future it might be preferable to have two separate positions, each of which could be part-time or full-time dependant on work load. The amendment does not change the status quo, the Human Rights Commissioner and the Discrimination Commissioner can continue to be filled by one person. The amendment simply provides greater flexibility so that this can change in the future without changing requiring legislative amendment.

Amendment 12 - Clause 45(2) – Introducing a time limit for the initial consideration of a complaint.

Various community groups have expressed concern regarding the removal of the 60-day time limit for an initial investigation of discrimination complaints, arguing that this time limit has worked well and should be retained. According to experts in the field, delays in any initial consideration of a complaint can result in respondents to a complaint attempting to stifle the complaint; pressure being applied to people making complaints; parties becoming increasingly entrenched and inflexible as time passes and memories fading; all of which can impact on the potential for a satisfactory resolution of the complaint. Our amendment proposes a 90-day time limit to apply to the initial investigation of all complaints to determine whether the complaint can be dealt with by the Commission, or should otherwise be declined. This would allow 30 days for the complaint to be allocated to a commissioner or commissioners and 60 days for an initial investigation to be conducted and a decision made with regard to whether the complaint will be taken further or declined. It is important to note that the time limit applies only to an initial consideration, not to the full investigation or resolution of the complaint. The obligation on the Commission in Clause 45 of the Bill to 'deal with complaints promptly and efficiently' continues to apply to the investigation and resolution of complaints.

Amendments 13 & 14 - Clauses 51(1) & 51(2) – Autonomy of Commissioners to refer a Complaint to Conciliation

Clause 51 of the Bill places the authority to refer a complaint to conciliation with the Commission rather than individual Commissioners. The amendments change this to give individual Commissioners the authority to refer a complaint that they are investigating for conciliation, without reference back to a meeting of the Commission. We believe that it is important that Commissioners have decision-making authority in matters that have been delegated to them and that there are no unnecessary delays in referring matters to conciliation.

Amendments 15 & 16 - Clauses 87(1) & 87(2) – Autonomy of Commissioners to Report to the Minister

Similar to the discussion above, Clause 87 of the Bill places the authority to make a report to the Minister with the Commission rather than individual Commissioners. The amendments change this to give individual Commissioners the authority to make a report to the Minister, without reference back to a meeting of the Commission. We believe that it is important that Commissioners have decision-making authority in matters that have been delegated to them and that Commissioners can act promptly in providing reports on matters of public importance.

Amendments to the Human Rights Commission (Children and Young People’s Commissioner) Amendment Bill 2005

Amendment 1 - Clause 13 – Additional Functions for the Children and Young People’s Commissioner

Consistent with our amendments (1, 3 & 6) to the functions of the HRC overall, the functions of the Disability and Community Services Commissioner and the functions of the Health Services Commissioner; this amendment proposes additional functions for the Children and Young People’s Commissioner. Broadening the role of this Commissioner is particularly important because supporting the rights and welfare of children and young has unique challenges that extend beyond service delivery settings. It is worth noting that in community consultations conducted by the Government, stakeholders identified the proactive promotion of rights and community education as primary roles of the Children and Young People’s Commissioner ahead of the complaint handling function. We believe that stakeholders got it right and that this facet of the Commissioners work needs to be given clear emphasis in the legislation.

Amendment 2 - Clause 13 – Decision-making authority of the Children and Young People’s Commissioner

Consistent with amendments (4, 5, 7 & 9) to the HRC Bill, this amendment narrows the range of decisions by the Children and Young People’s Commissioner that are subject to decisions of the Commission as a whole. The Bill states that exercising the functions of the Children & Young People’s Commissioner is subject to decisions by the Commission. This could mean that any decisions of the Children and Young People’s commissioner are subject to decisions made by a meeting of all the Commissioners and the President of the Human Rights Commission. The

amendment changes the clause to make the Commissioner subject to decisions of the Commission only in relation the administrative arrangements, giving the Commissioner more autonomy to fulfil the responsibilities of their role. This also makes the restrictions that apply to the function of the commissioner consistent with the restriction of the President's functions in Clause 19(2).

Amendments 3 & 4 - Clause 14 - Functions and decision-making authority of the Disability and Community Services Commissioner

These amendments repeat amendments 3 & 4 to the HRC Bill and will only be moved if they have been agreed to in that debate. Because of changes to the same clauses contained in this Bill these amendments need to be moved again in order not to be lost.

Amendment 5 - Schedule 1, Changes to Section 5(2)(n) of the Ombudsman Act 1989 – Jurisdiction of the Ombudsman

Amendments to Section 5(2)(n) of the Ombudsman Act 1989 contained in this Bill would restrict the jurisdiction of the Ombudsman in relation to complaints about services provided to children and young people, with similar restrictions to complaints about health services, disability services and services to older people introduced in the HRC Bill. The Scrutiny of Bills Report (No. 14) raised concerns regarding the potential for jurisdiction disputes arising as a result of this, which could result in some complaints not being handled by either the Ombudsman or the Human Rights Commission. We believe that it is important to avoid this and our amendment would omit Clause 5(2)(n) in the Ombudsman leaving that office with jurisdiction over any complaint that is not dealt with by the Human Rights Commission. Clause 6(B) of the Ombudsman Act 1989 requires the Ombudsman to refer any complaints more appropriately dealt with by the Human Rights Commission to the Commission, thus avoiding duplication or confusion without limiting the jurisdiction of the Ombudsman.

Amendments to the Public Advocate Bill 2005

Amendment 1- Schedule 1, Changes to Section 6B of the Ombudsman Act 1989 – Mandatory Referral to the Public Advocate

Section 6B of the Ombudsman Act 1989 contains an obligation of mandatory referral of complaints by the Ombudsman to another statutory agency if one of the listed agencies is the more appropriate agency to investigate the complaint. The amendment adds the Public Advocate to the list of agencies that the Ombudsman can refer complaints to.