Wind out of the sails — new federal structure for the administration of human rights legislation

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A number of changes are currently being made at a federal level in relation to the administration of anti-discrimination legislation and the structure and functioning of the Human Rights and Equal Opportunity Commission (HREOC). The Human Rights (Legislation Amendment) Bill No 1 1996, now passed by both Houses of Parliament, puts into place the first, and probably most significant changes. This is likely to be followed by the Human Rights (Legislation Amendment) Bill No 2 1998, which further alters the structure of HREOC and its functioning. There is also an intention to make further changes, which will take the form of a proposed Federal Magistrates Bill. This essay critically assesses those changes, with a particular focus on the implication of the changes for people with disabilities.

Background

The changes currently being undertaken are a direct result of the decision in *Brandy v HREOC*,[1] a 1995 case in which the High Court held that the HREOC does not have power to make decisions in discrimination cases that are enforceable (except when the Commonwealth Government is the alleged discriminator). This meant that the three federal laws prohibiting discrimination — the *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth) and *Disability Discrimination Act 1992* (Cth) — did not provide a way of getting a compulsory outcome.

As a result of that decision the previous Federal (Labor) Government proposed legislation to make changes to the way discrimination law operates at a federal level. The Human Rights (Legislation Amendment) Bill was developed and put to the Federal Parliament in 1996. The Senate referred the Bill to the Senate Legal

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1 *Brandy v HREOC* (1995) 183 CLR 245.

and Constitutional Affairs Committee for an inquiry into its impacts. This Committee held public hearings and produced a report in 1997. At the same time all of this happened, the new Federal Coalition Government announced, in its first budget, significant cuts to HREOC. These cuts amounted to over 40 per cent of HREOC's budget which are being implemented gradually over three years. The Human Rights (Legislation Amendment) Bill was reintroduced into Parliament following the 1998 election. The Human Rights (Legislation Amendment) Bill No 2 was also referred to the Senate Legal and Constitutional Committee whose report was tabled in Parliament in February 1999.

On Monday 20 September, Human Rights (Legislation Amendment) Bill No 1 (Bill No 1) was passed by the Senate with minor amendments. The amendments were passed by the House of Representatives later that week. The Human Rights (Legislation Amendment) Bill No 2 (Bill No 2) is currently in the House of Representatives awaiting debate.

Human Rights (Legislation Amendment) Bill No 1

The main features of the changes which occur under Bill No 1 are in relation to the complaints handling structure of HREOC and the Federal Court. What follows is an analysis of each of these changes.

Structure of HREOC and Commissioners

HREOC currently has special purpose Commissioners who receive, investigate and conciliate complaints of discrimination under each of the three pieces of legislation. Bill No 1 centralises the complaints handling function with the President, currently, Professor Alice Tay. Complaints will no longer be investigated within a specialist portfolio office and the President's position has been changed from part time to full time.

The President is not able to delegate any power in relation to handling complaints to the new Deputy Presidents (who will be replacing the specialist Commissioners under Bill No 2). The President alone will have to sign off to clients when a complaint is terminated[2], and only once this happens can a complainant go the Federal Court under anti-discrimination legislation. What

2 Termination includes where the complaint is considered non-conciliable or where the President declines to inquire into the complaint.

this means is that the process from lodgement to conciliation will now be the direct responsibility of the President, although in reality most of these matters will be handled by Commission staff. Conciliation agreements are not currently registered, so non-compliance is in effect a breach of contract. Oddly, the Senate amendments to Bill No 1 included an amendment providing that a person presiding at a conciliation conference must ensure that the conduct of the conference does not disadvantage either the complainant or the respondent. This is a usual rule for a conciliation[3] and therefore would seem unnecessary.

Further, the Specialist Commissioners have now been given a role in acting as 'amicus curaie', or 'friend of the court'.[4] The special purpose Commissioner will be able to act as amicus curaie in proceedings which effect the rights of non-parties, the public interest, or which have implications for the administration of the legislation. This power does not replace the current power of the Commission to intervene in proceedings involving discrimination issues.

Removal of hearing/inquiry function

The main and possibly the most contentious change effected by the Bill is the removal of HREOC hearing/determination function and the consequent move of discrimination hearings to the Federal Court. The move to make outcomes of discrimination complaints enforceable has been supported by everyone working in this area. The situation since *Brandy* has been difficult for complainants who have been given outcomes by HREOC only to have the respondent refuse to comply with HREOC's order or outright denying the jurisdiction of HREOC. It has been considered paramount, since *Brandy*, to ensure that decisions under discrimination legislation are enforceable and enforced in order for the legislation to have real substance. It is also considered important in the context of Australia's international obligations given that Federal anti-discrimination legislation has been made pursuant to ratified United Nations Conventions, Covenants and Declarations.

3 See HREOC, *Manual for Conciliators*, September 1996, particularly para 3.8.26 to 3.8.32 — titled 'The use of power in conciliation'.

4 See Boniface D J 'Does anyone really know where we're going? Changes to the Human Rights and Equal Opportunity Commission' (1997) 4(1) AJHR 188.

Hearings in the Federal Court

The Bill provides a set of circumstances in which the President of HREOC can 'terminate' a complaint. If a complaint cannot be conciliated, the complainant must make an application to the Federal Court for a hearing.

The move to the Federal Court has met with some controversy and resistance for a number of reasons. The first of these is the cost of proceeding in the Federal Court is usually expensive, making the jurisdiction (and therefore the enforcement of human rights under discrimination legislation) inaccessible to most complainants who are often individuals on low incomes. Proceeding with a complaint in the Federal Court usually involves filing fees and sitting fees as well as the general costs of litigation such as the costs of transcripts. The introduction of filing fees and sitting fees has been addressed in part because the Federal Court is able to waive such fees in cases of financial hardship. Further, with political pressure from the community sector, the government agreed to introduce a flat $50 up-front fee for people lodging discrimination complaints in the Federal Court. This fee may still be waived in cases of hardship.

A second concern in relation to hearings in the Federal Court relates to in-court procedures and, particularly, the rules of evidence. The Bill does not specifically state that judges are not bound by the rules of evidence, although it does states that the Court is not bound by technicalities or legal forms. However, given the jurisprudence of the Federal Court, it is likely that the normal rules of evidence will apply.

The application of strict rules of evidence is a change from the current system in anti-discrimination law that states, in each of the federal laws, that:

> ... the Commission ... is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit ...[5]

This change means there will be less flexibility in what evidence can be presented to the Court in support of an allegation of discrimination. For some people making complaints of discrimination this change will create a significant barrier to success.

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5 See s 98 of the *Disability Discrimination Act 1992* (Cth); s 77 of the *Sex Discrimination Act 1984* (Cth); s 25V of the *Racial Discrimination Act 1975* (Cth).

The main and most significant change that has occurred, however, is the movement from a 'cost free' jurisdiction to a 'costs follow the event' jurisdiction. Currently during hearings at HREOC parties bear their own legal costs. In the Federal Court however, the judge has discretion to award costs, the usual rule being the losing party pays the costs of the winning party according to a costs scale. The costs scale is usually less than the actual level of fees charged by lawyers and frequently, parties must dip into their award of damages to pay for the remainder of their legal costs.

The inclusion of the 'costs follow the event' jurisdiction has been met with vehement objection and disappointment in the disability sector and by the many community organisations and community legal centres which lobbied for the jurisdiction to be a 'costs free' jurisdiction. The Australian Labour Party (ALP) moved an amendment in the Senate to include a provision which would have made the Court 'cost free' in human rights complaints (the provisions was based on a similar jurisdiction in the *Workplace Relations Act 1996* (Cth)). This amendment was not accepted by the Democrats who argued that the inclusion of a 'costs follow the event' rule would attract legal professionals to represent clients in this area. The Australian Law Council and HREOC supported this position.

Disability groups and community legal centres, however, are too aware that the inclusion of this rule would simply prevent anyone from taking their complaint to a hearing. Anti-discrimination laws are intended to redress the inequality and disadvantage experienced by those who seek to invoke its protection. It is precisely the people who have experienced discrimination and disadvantage and are making a complaint under statutory protection, who are unable to assume the risk of a costs order or any other financial disincentive to enforcing their rights. Even if the complainant is granted legal aid, the Legal Aid Commission will not pay for the costs of the other party.

Rather than take the risk of losing and being ordered to pay the other side's legal costs, many people with discrimination complaints will feel forced to accept lower outcomes in the conciliation process or to withdraw their complaint if a conciliation results in no offer from the other side. Knowledge by respondents to complaints (and their solicitors) of this fear is likely to mean that respondents will make paltry offers in settlement (or none at all).[6]

6 Combined Community Legal Centres Group Human Rights and Discrimination Committee Submission to the Senate Legal and Constitutional Committee Inquiry into the Human Rights Legislation Amendment Bill, March 1997.

There is little evidence available that suggests there are large numbers of people wanting to proceed to a hearing who are unable to do so due to lack of legal representation. The existence of specialist legal centres, funding from legal aid and increasing numbers of pro bono schemes mean that people with arguable cases could generally find appropriate legal representation. It is, rather, the application of the 'costs follow the event' rule in the Federal Court that causes many people to avoid their cases going to hearing.[7] Previously complainants were afraid that once they got a decision in their favour in HREOC, that many respondents would appeal or not comply with the decision, which would force them into the costs jurisdiction of the Federal Court. The situation has not improved with the current legislation, and the situation is now such that only a complainant who is absolutely certain of winning in the Federal Court, or who has no assets, will be willing to take the risk of a hearing.[8]

It should also be noted that it is very common for anti-discrimination cases to involve individuals as complainants and businesses or government agencies as respondents. This means that it is the individual complainant who bears the costs personally if she or he loses the case, while it is a business or government agency that bears the costs if it loses. In the case of a business at least some part of those legal costs are a tax deductible expense. In the case of a government agency, the costs are effectively paid by the tax payer. As such, the risk is more limited for respondents in this jurisdiction than for complainants.

It has been suggested that the 'costs follow the event' rule will be beneficial to complainants as it will encourage private solicitors to take cases for complainants on a contingency or speculative basis. However, most States and Territories have very specific rules regarding the use of contingency fee arrangements between solicitors and clients. This is referred to in some detail in the *Access to Justice* report.[9] The restrictions on the use of contingency fees make such arrangements significantly less attractive to solicitors.[10]

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7 Based on the personal, professional experience of the authors.

8 This paper does not consider the additional barrier for impecunious litigants that arises from the 'security for costs' requirements.

9 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (National Capital Printing, 1994) see particularly paras 6.3-6.

10 Above, note 9, para 6.4. Consider the words of the *Access to Justice: An Action Plan*:

> Contingency fee arrangements can take a number of forms: *speculative fees*: in the event of a win, the lawyer charges the usual fee only; *uplift fees*: *in the event of a win, the lawyer charges the usual fee plus an agreed flat amount or percentage*

Further, the question of the desirability for lawyers taking on discrimination cases on a contingency fee basis is exacerbated by the very low compensation awards found in the anti-discrimination jurisprudence of Australia. Unlike personal injury actions, which can achieve awards of compensation in the millions of dollars, awards in anti-discrimination cases are usually between $5000 and $50,000. In disability discrimination cases, awards are commonly under $10,000 unless there is a significant loss of income. Often, the outcome may not involve compensation at all, but a change in policy (particularly in education cases). This means that even if percentage fee arrangements were to be introduced, the likely fees achievable would not be sufficient to attract solicitors into litigation where they only get paid if they win.

In response to the suggestion that a 'costs follow the event' will attract more lawyers to the jurisdiction, it must also be said that no matter how many solicitors or barristers are willing to represent a complainant for free or on a contingency fee basis, this does not remove the risk of an order to pay the legal costs of the other party. The barrister or solicitor are not permitted to take this risk over from the complainant and, as such, it remains the most significant barrier to complainants.

The inclusion of a 'costs follow the event' rule in the Federal Court also appears to be inconsistent with the industrial relations jurisdiction. A person whose employment was terminated because of their disability may seek redress by making a complaint of unlawful termination under the *Workplace Relations Act 1996* (Cth) or discrimination in employment under the *Disability Discrimination Act 1992* (Cth) (DDA). The *Workplace Relations Act 1996* contains a provision prohibiting the award of costs except where the complaint is vexatious or unreasonable.[11] The Federal Court is a cost free jurisdiction in relation to the former type of complaint and not the latter. This will surely impact on choices of jurisdiction.

There has been some argument, for example raised in Senator Vanstone's speech,[12] that these changes can only improve the lack of effectiveness in the current system. It was argued that under the current structure, a complainant

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uplift of the usual fee; and percentage fees: in the event of a win, the lawyer charges an amount calculated as a percentage (which might be fixed or sliding) of the amount won. Although the position in Australia is in a state of flux, in most jurisdictions lawyers are permitted to charge clients on a speculative basis, but not on a fee uplift or percentage basis ...'

11 *Workplace Relations Act 1996* (Cth) s 170CJ.

12 *Hansard*, Senate, 20 September 1999.

would be subject to these procedures, rules and cost risks anyway because in order to obtain an enforceable decision, the complainant had to have the matter heard in the Federal Court following the decision of HREOC. While theoretically this is true, having received a decision from HREOC which supported the complainant's case, complainants feel more confident (and respondents less so) about their chances of success in the Federal Court.

The new scheme will operate six months from the date of Royal assent, which is imminent. Unless a complaint is part heard or has hearing dates set before the end of this year, it is most likely that it will be heard by the Federal Court under the new regime.

Amendments made to Bill No 1

The minor amendments that were moved in the Senate and accepted in the House of Representatives include the provision for HREOC to look into a 'systemic' act or practice which may be discriminatory. This amendment is considered largely token as it does not appear to alter the current practice of HREOC. The inclusion of the representative complaints provisions in the *Disability Discrimination Act 1992* was intended to address some of the systemic issues of disability discrimination.

However, running a representative complaint in the Federal Court, which is usually large and costly, will simply be too risky with the risks of a costs order and complainants are therefore likely to 'opt out' of the complaint. There have also been some amendments with respect to who can lodge a representative complaint, as a result of which some representative complaints are terminated at an early stage.[13] The ability of the *Disability Discrimination Act 1992* to deal with systemic issues will be significantly diminished rather than increased under Bill No 1 and, as a result, the legislation will be unlikely to be a tool used to shift entrenched attitudes.

Human Rights (Legislation Amendment) Bill No 2

The Human Rights (Legislation Amendment) Bill No 2 (Bill No 2) is currently in

13 Combined Community Legal Centres Groups Human Rights and Discrimination Committee, Submission to the Senate Legal and Constitutional Committee Inquiry into Human Rights Legislation Amendment Bill, March 1997.

the House of Representatives and is expected to be debated in the near future. Bill No 1 follows on from some of the changes made by Bill No 1 in relation to the structure and functioning of HREOC.

Specialist Commissioners to Deputy Presidents

This Bill amalgamates the current structure of the special purpose Commissioners by removing the current specialist portfolios of: race, sex, disability and Aboriginal and Torres Strait Islander social justice and introduces three more general Deputy Presidents responsible for human rights and disability, sex and equal opportunity and race and social justice. This is a loss for people with disabilities and Indigenous Australians as the amalgamation of these portfolios may mean a loss of expertise, the recognition of particular disadvantage and a loss of the personal experience of disadvantage that is possible within a specialist portfolio.[14]

The Bill also lacks transitional arrangements for the current special purpose Commissioners and may be seen by some as an attack on the independence of the Commissioners.[15] However, given the actual expiry dates of the current Commissioners' terms of appointment, there may be no real issue relating to transition.

Change of Name

The Bill changes the name of HREOC to the 'Human Rights and Responsibilities Commission' (HRRC). The Government has indicated that the change of name relates to the increased emphasis on responsibilities of all people, which is linked to the increased focus of the Commission on education. This name, however, is seen by many community groups as implying a responsibility on people seeking to enforce their human rights. Further the removal of the reference to 'equal opportunity' implies that we have now reached a position where all are afforded equal opportunity – or alternatively that this is no longer important. It is clearly not the case that imbalance and disadvantage have levelled out.

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14 Section 20 Combined Community Legal Centres Group Human Rights and Discrimination Committee, Submission to Senate Legal and Constitutional Committee Inquiry into Human Rights Legislation Amendment Bill No 2 July 1998.

15 See Senate Legal and Constitutional Committee Report s 24.

Educational emphasis

The Bill emphasises the education function of the HRRC by replacing existing provisions and apparently prioritising education, information and production of guidelines as the most important activities of the HRRC. However, it is noted that the Bill provides no mechanism for additional funding and there is no consideration of the impact that this will have given the reduced resources of HREOC. This raises the question — how will the new education programs and guideline publication be funded?[16] In the struggle for resources, the emphasis on education — no matter how important this is — may result in a de-emphasis on proper complaints handling. The HRRC remains responsible for the investigation and conciliation of individual complaints (like its State counterparts). Given that most complaint are settled during the investigation/conciliation process, there should be no less emphasis on this function of the HRRC.

Further there is a need to ascertain the legal validity of guidelines produced by HREOC. This matter was raised by community legal centres[17] and was suggested as a matter for clarification in the Senate Committee Report. The proposed legislation throws no light on this problem.

Power of intervention

One of the main issues arising from the Bill however, is the change to HREOC's intervention power. Currently HREOC has the power to intervene in legal proceedings involving discrimination issues. This power has been used a number of times after the last few years. Bill No 2 introduces a new intervention power that provides that the HRRC may intervene with the 'approval' of the Attorney-General. The Bill then lists a number of factors which the Attorney-General may, but need not, take into account in considering an intervention. The Government has stated that this is to protect the interests of the Australian community. It has been submitted that, as leave of the court is already required in order for HRRC to intervene, it is ineffective and unreasonable to add a second barrier to intervention by HRRC. [18]

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16 Above, note 15.

17 See Combined Community Legal Centres Group Human Rights and Discrimination Sub-committee submission to Senate Legal and Constitutional Committee.

18 Combined Community Legal Centre Group Human Rights and Discrimination SubCommittee Submission to Senate Legal and Constitutional Committee review of Human Rights Legislation Amendment Bill No 2, July 1998.

This provision seriously restricts the Commission's power to act independently of Government and may impair its effectiveness in intervening in cases where human rights issues are raised. This may also give rise to a conflict of interest where the Federal Government is a party to proceedings.[19] Some of the instances of intervention have involved proceedings against Ministers and Government Departments.[20] A further conflict may arise where the proceedings are in relation to the human rights issues arising from the interpretation of federal legislation.[21] The Senate Legal and Constitutional Committee Report recommended that this provision be amended so as not to require the approval of the Attorney-General, but at this time the Bill has not been amended to take account of this recommendation.

Federal Magistrates Bill

While receiving less attention to date in the debate around changes to the federal structure of administration of human rights legislation, the proposed Federal Magistrates Bill is an important third element of the new structure. The idea of a Federal Magistrates Court was initially raised to deal with the significant backlogs and delays of Federal Courts, particularly the Family Court. In discussions at the time when Bill No 1 was first introduced to Parliament, the concept of the Federal Magistrates Court was floated as a way of alleviating the increase in workload that Bill No 1 would bring to the Federal Court. The Federal Magistrates Bill was referred to the Senate Legal and Constitutional Committee whose report was tabled on 11 October 1999 and the Bill went to the House of Representatives on 19 October and the Senate on 23 November.

19 Above, note 18.

20 See for example, the following cases involving government. In *Wu Yu Fang & Ors v Minister of Immigration and Ethnic Affairs and the Commonwealth of Australia* (1995) ALR 367. the human rights issued raised by the Commission related to rights of persons in detention to have access to legal advice. This case illustrates that where a government department is a party to the proceedings the discretion of the Attorney-General to approve the Commission's intervention gives rise to a conflict of interest. See also *C, L, J & Z v Minister for Immigration and Ethnic Affairs* (Federal Court, 30 March 1995), Nos DG9-11 of 1994 and DG12 of 1992 Fed 184/95 Immigration, where the issue raised was the definition of a refugee under the Refugee Convention.

21 Examples of this include *B v B* (Full Family Court, 9 July 1997) where the Court considered the interpretation and application of the Family Law Reform Act and *Qantas Airlines Ltd v John Christie* [1998] HCA 18 which considered application and interpretation of the *Industrial Relations Act 1988* (Cth).

Proceedings in a Federal Magistrates Court

The Bill allows for a party to a proceeding to make an application to transfer a proceeding from the Federal Court to the Magistrates Court, or vice versa. The Bill also allows the Magistrate or Federal Court judge to make such a decision. There is no appeal of a decision to transfer. Federal Magistrates will be appointed as Chapter III judges (under the Commonwealth Constitution), thereby avoiding any question of enforcement of decisions. As such, it may be a significant alternative jurisdiction to the Federal Court in the hearing of discrimination complaints.

Generalist magistrates

The magistrates will have general functions and neither the Court nor the magistrates will have any particular human rights specialisation, such as a human rights division. This is an inadequate proposal. Specialist and clear understanding of the issues facing people who are experiencing discrimination, and even a personal experience of the disadvantage, are required for appropriate human rights justice. Many judges in this area have already shown a tendency to devalue the personal and emotional aspects of human rights jurisdiction. An indication of this is the low awards of compensation for the injury of discrimination.

Discrimination law has become more legalistic and legally tricky over recent years, and under a generalist structure magistrates will be required to competently be informed of many issues and legalities in this as well as other all the other areas of law. The specialist lists of the amalgamated tribunals (such as the Equal Opportunity Division of the NSW Administrative Decisions Tribunal or the Anti-discrimination List of the Victorian Civil and Administrative Tribunal) would appear more appropriate as a structure for the Magistrates Court to take over jurisdiction on a range of different areas of law.

Decision-making

A further area of concern is the provision in the Bill for magistrates to give reasons for decisions either orally or in writing. The Bill and the Federal Magistrates (Consequential Amendments) Bill further enable a magistrate and a Federal Court judge on appeal to give reasons for decisions in 'short form', although it does not define what 'short form' is. There is no requirement that the statement of reasons set out the findings of fact and the evidence on which the decision was based. This substantially affects a person's ability to appeal a decision of the magistrate if there is no written and legally considered judgement. Appeal of a Federal Magistrates decision is to the Full Court of the Federal Court,

and so an applicant must be able to properly assess the merits of appeal. In the absence of a written and justified reason for a decision, this would be impossible.

Further, as discrimination laws are still relatively new, case law is required in this area to give consistency and guidance for later complaints and the consistent functioning of HRRC. This is of course, unless the proposed Magistrates Court is intended to provide only a summary or quasi form of justice to those who cannot afford to go to the Federal Court. Assuming this is not the purpose of the proposal, the Magistrates Court must be structured as an appropriate and equal alternative to the Federal Court in terms of the quality of justice and decision making.

Costs

The Bill provides that a magistrate has the discretion to award costs, unless the proceeding is pursuant to a statute which does not permit the awarding of costs (such as the *Workplace Relations Act 1996* (Cth)). Again this means that the general rule of 'costs follow the event' will apply unless the Court Rules provide otherwise. Similar issues raise above in relation to Bill No 1 again surface in the debate around the Federal Magistrates Bill. It would appear consistent and fair for the Magistrates Court, which is heralded as a cheaper and simpler alternative, to be a 'cost free' jurisdiction. This can give parties the choice of whether they want to expose themselves to the formalities and risks of costs in the Federal Court or to use the less formal and less risky Magistracy alternative.

Conclusion

It appears that unless some substantial alternatives can be put into place within the Magistrates Court, the federal human rights jurisdiction will no longer be utilised by complainants. Disability and other groups have already indicated a serious lack of faith in the jurisdiction which is failing more and more to meet the needs of disadvantaged groups as the new structure unfolds. While the enforceability of decisions in this area is important, so too is the accessibility of the complaints procedure. A human rights system which relies on the risks of litigation and court process in order to redress and eliminate discrimination is an inadequate response to the discrimination and disadvantage created by and perpetuated by our governments and our society.

The abandonment of the Federal jurisdiction by disappointed and increasingly marginalised community advocates will leave the State jurisdictions, which are already under-resourced, with an increase in complaints which would otherwise

fall within the responsibility of the Federal jurisdiction. Further, there are some complaints that cannot be dealt with in State jurisdictions and will simply fall through the cracks.

In examining the cuts that this government have already made to HREOC, and the lack of legal aid funding available to people pursuing Commonwealth discrimination matters, this chain of events exposes the Federal Government's true agenda — preventing people from pursuing their rights. Clearly, the situation is totally unacceptable and undermines any positive claims made about the commitment to human rights in this country at a national and international level.

Postscript

Since the time of writing, some of the legislation referred to in this article has moved further through the parliamentary process. This has resulted in a number of amendments to the provisions discussed above.

Bill No 1

Following the passing of Bill No 1, the Federal Court has made Federal Court Rules for Human Rights Proceedings.[22] The Rules generally provide the forms to be used in human rights proceedings but do not make any other specific Rules in relation to the conduct of discrimination proceedings.

Bill No 2

Bill No 2 was passed by the House of Representatives but is still awaiting debate in the Senate. Before passing the Bill in the House of Representatives, the government passed an amendment to the Bill so that 'before the Commission seeks leave to intervene in proceedings ... the Commission must give the Attorney-General written notice of the Commission's intention to do so together with a statement of why the Commission considers it appropriate to intervene. The notice must be given at a time when there is still a reasonable period before the intervention is to take place.' This provision replaced the previous proposal to require the 'approval' of the Attorney-General.

22 Federal Court Amendment Rules 1999 (No 7).

Given that the activities of HREOC are already reported to the Attorney-General's Department, the reason for this amended provision is not apparent. Fears remain that this provision allows for an 'informal approval' process by the Attorney-General before HREOC will intervene in a proceeding regarding discrimination.

Federal Magistrates Bill

Following political negotiations, an amended Federal Magistrates Bill was passed by both Houses on 6 December 1999. The most significant relevant amendments mean that Federal Magistrates and Federal Court judges hearing appeals of Federal Magistrates decisions must give reasons for their decisions, contrary to the proposed provisions.

No amendments were made to the costs provisions which apply in the Court.

Further, the Attorney-General's Department responsible for setting up the new Court has not indicated that experience in human rights will be a priority or requirement for the appointment of new Magistrates. The appropriateness of Magistrates hearing human rights cases therefore remains a concern. The appointment of a Chief Magistrate is imminent. ●